§ Law in Context

ALISON CLARKE & PAUL KOHLER

Property Law

Commentary and Materials

CAMBRIDGE

CAMBRIDGE www.cambridge.org/9780521614894

18

Security interests

18.1. The nature and function of security

18.1.1. Nature of security

A security interest is a proprietary interest in an asset owned by someone else, which is held *only* as security for the payment of a debt or performance of an obligation, in the sense that, as soon as the debt is repaid or the obligation is performed, the security interest ends.

18.1.1.1. Terminology problems

As we see below, there are four main types of security interest in English law: the mortgage, the charge, the pledge or pawn, and the lien. These are four quite distinct categories and they have different characteristics. The terminology, however, is not always strictly applied. In particular, the terms 'mortgage' and 'charge' are sometimes used interchangeably, and both are sometimes used as generic terms referring to any type of security interest. To compound the confusion, the only type of legal security interest that can now be created over an interest in land – the 'charge by way of legal mortgage' – is a statutorily created hybrid of the first and second categories, borrowing characteristics from both.

Another terminological oddity is that the lay terms used to describe secured transactions give a wholly inaccurate description of the technical nature of the transaction. In lay terms, aspiring property owners 'get' a mortgage (a valuable commodity) from a bank or building society (which is in the business of 'offering' mortgages to borrowers), and the bank or building society may then allow the owners to 'keep' the mortgage when they move house. And, if there is a default in repayment, the bank or building society may then decide to 'repossess' the property – as if taking back its own.

Technically, what is happening is quite different. A security interest is a derivative interest carved out of the borrower's property interest (and so granted by the borrower to the lender, not the other way round) to secure repayment of the debt. The grant of the security interest does not diminish the value of the secured asset to the grantor: it just earmarks the secured asset for the repayment of that debt rather

than any other debt owed by the borrower, as Mr Justice Millett pointed out in *Re M. C. Bacon Ltd* [1990] BCC 78. Nor of course does the security interest have any value to the borrower, other than that his ability to offer to grant it to the lender is a means of persuading the lender to lend him money. The security interest does have a value to the lender, but it is directly related to the amount of the outstanding loan: it is worth precisely the same as the outstanding indebtedness, and, as that decreases as the borrower repays instalments of capital, so too does the value of the mortgage to the lender. If there is a default in repayment, the lender can then enforce the security, which it usually does by selling the *borrower's* interest in the secured asset, free from the security, by using what is essentially an exception to the *nemo dat* rule, which gives it power to sell a greater interest in the asset than it itself holds.

18.1.1.2. Legal and equitable rights to redeem

The borrower has a contractual right to have the security interest discharged by making repayment on the due date. This is known as the legal right to redeem. In addition, whatever form the security takes and notwithstanding anything to the contrary in the security documents, equity confers on the borrower an *equitable right to redeem* the asset (i.e. to have the security interest discharged by paying everything due) at any time *after* the legal date for repayment has passed, regardless of default, and extinguishable only on a sale by the mortgagee in exercise of its power of sale (or on foreclosure, but this is now obsolete). This is one aspect of the special protection that equity has traditionally given to mortgagors. We will come across other aspects later.

18.1.1.3. Creation, attachment and perfection of security

A final terminological point. It is sometimes useful to distinguish three different stages in the creation of a security interest. The security interest is *created* at the point when a present right, enforceable against the grantor, is conferred on the grantee. It *attaches* to an asset as soon as a specific asset becomes subject to the interest, so that from that point the grantee has a proprietary interest in the secured asset. It is then *perfected* once any necessary steps have been taken to make it enforceable against third parties (for example, registration). All three events may well take place simultaneously, but they need not. If, for example, you are proposing to buy the fee simple interest in land financed by a mortgage loan and you execute the mortgage deed before you have completed the purchase, the mortgage is *created* when you execute the mortgage deed, it *attaches* to the fee simple interest when you subsequently acquire it, and it is *perfected* when the mortgagee registers the mortgage at the Land Registry.

18.1.2. Function

Secured lending is extraordinarily prolific in this country, as we see below, and it is important to appreciate why this is so. Security offers a lender things that he cannot

get by using the legal machinery provided for enforcement of debts which are unsecured. If I fail to repay an unsecured bank loan, the bank can sue for repayment, obtain a court order for repayment, and then (if it wants to choose this in preference to other available enforcement measures) get the court to make a charging order over any of my assets under the Charging Orders Act 1979. This will enable the asset to be sold, and the bank will be entitled to recoup the debt (plus interest and costs) out of the sale proceeds. As far as the bank is concerned, there are three snags in this procedure. First, even if I held more than enough assets to cover the debt at the time when I borrowed the money, I might have sold them all and spent the money before the bank is able to apply for a charging order. Secondly, even if I still have the assets, I might owe money to other lenders and the total value of my debts might exceed the total value of my assets. Other creditors might therefore get to the assets first, in which case the bank will get nothing, or I might go bankrupt, in which case all my unsecured assets will be sold and the proceeds (minus considerable costs) will be divided proportionately between the unsecured creditors. The bank, like all the other creditors, will inevitably receive less than full repayment, and will have to accept it as final settlement of the debt. Thirdly, I might have already mortgaged or charged all my assets to some other creditor, which would mean that any charging order the bank obtains over an asset will take priority after the pre-existing mortgage or charge over that asset. If the bank then requires the asset to be sold (as the charging order entitles it to do), the sale proceeds will be used first to pay off the whole of the debt secured by the pre-existing mortgage or charge over the asset (plus interest and costs) before anything is made available to the bank. The bank would have been better off if it had taken security, in a number of ways.

18.1.2.1. Right of first recourse

First, security over an asset gives the security interest holder the right of first recourse to it. If there is default in repayment, the secured creditor can sell the asset and obtain repayment out of the proceeds of sale in priority to anyone else (except someone with a prior-ranking security interest over the same asset). Most importantly, this applies even if the debtor goes bankrupt. A secured creditor is largely unaffected by the bankruptcy or liquidation of its debtor: its power to sell the asset and recoup all its debt (including interest and costs) out of the sale proceeds is generally not restricted in any way. If there is a surplus left after it has done so, that goes into the general pool of assets to be divided among the unsecured creditors. So, in any bankruptcy or liquidation, unsecured creditors are paid just a fraction of what they are owed (almost invariable a tiny fraction) whereas secured creditors are paid in full (assuming the secured asset was worth more than the total indebtedness).

This is not only a good thing in itself, as far as the secured creditor is concerned. It also dramatically reduces the risk in lending. Provided the lender ensures that there is a sufficient margin between the value of the asset it accepts as security and the amount it lends, its return of its capital is more or less guaranteed.

18.1.2.2. Attachment to the asset

Since security interests are property interests in the secured asset, they are attached to the asset, in the sense that the asset owner cannot sell the asset free from the security interest unless he either pays off the debt or obtains the lender's consent. If he does neither, the security interest will be fully enforceable against the buyer (subject to the enforceability rules discussed in Chapters 14 and 15 above). This does not make the buyer personally liable for the debt, but it does entitle the security interest holder to sell the asset and recoup the debt out of the proceeds, handing back to the buyer only whatever is left after that.

18.1.2.3. Non-judicial enforcement

The security interest holder's primary remedy (although not the only one, as we see later) is to sell the secured asset, and in most cases it can do so without first obtaining a court order, or going through any other formal procedure. It does not even have to sell by auction: the sale will be an ordinary private sale. This ability to enforce security by a simple self-help process is uncommon in other jurisdictions. It has considerable attractions for lenders. It means that the lender does not have to satisfy anyone in advance that default has justified enforcement or that this is the most appropriate way of obtaining repayment, there is no public scrutiny of the conduct of the sale or the price obtained, and no time-consuming, costly court process to go through. For reasons considered later, it is not common for mortgagees of owner-occupied dwellings to sell without first obtaining a court order, but it is routinely done by lenders with security interests over all other types of asset.

18.1.2.4. The hostage function

A secured lender's first concern is the same as that of an unsecured lender: to ensure that the borrower repays the loan in accordance with the terms of the loan agreement. Security acts as a hostage, providing an incentive for the borrower to comply with the loan agreement. If a lender takes security over an asset that the borrower values highly, fear of losing the asset will induce the borrower to go to greater lengths than it might otherwise have done to keep up repayments. When money is short, it will make these repayments before paying other debts, and it will hesitate before engaging in risky behaviour which might endanger its ability to repay. From this perspective, the best kind of asset to take security over (assuming you are the lender) is something that the debtor values as thing rather than as wealth, such as his small child, or a pound of his flesh, or his home. This helps to explain why lending money on the security of people's homes is such good business. Homes are in many ways the ideal hostage, because not only will the borrower give first priority to keeping up the mortgage repayments, but the secured asset has a more or less stable, predictable market value (unlike small children and pounds of flesh) so that the lender can be reasonably confident of recouping all the indebtedness if the borrower does default and it has to have recourse to the security.

18.1.2.5. Signalling, monitoring and control

A debtor who offers a valued asset as security can be said to be signalling his confidence that he will be able to repay, thus lessening the need for the lender to engage in expensive checks on his creditworthiness. If the asset has a predictable market value which is greater than the proposed loan, the creditor has even less need to check creditworthiness. In other words, security can be said to operate as a signalling device, enabling lenders to identify reliably and cheaply which potential borrowers are creditworthy, or alternatively allowing them to dispense with costly credit-checking at the outset and monitoring of behaviour during the security. Arguments on these lines can be found in Scott, 'A Relational Theory of Secured Financing', Goode, 'Is the Law Too Favourable to Secured Creditors?' and Buckley, 'The Bankruptcy Priority Puzzle', pp. 1395–6.

On the other hand, security can also be used as a means of *enabling* the lender to monitor the behaviour of the borrower. The terms of a security interest over assets will usually require the borrower to maintain the value of the secured asset by keeping it in a good state of repair, to insure it and ensure that the insurance is maintained at a sufficient level, and to notify the lender of any event threatening the value of the secured asset or the ability of the borrower to repay. In this country, bank loans to businesses are usually secured by security interests taken over *all* the assets of the business. This not only gives the lender access to comprehensive information about the running of the business, but also gives the lender the opportunity to exercise a significant level of control over decision-making, as well as enabling the lender to take early action to safeguard its interests. In particular, it enables the lender to take over management and control of the business if it fears the borrower will default, by exercising the security interest holder's remedy of appointing a receiver of the secured assets (an ability now curtailed, but not removed altogether, by changes made to receivership by the Enterprise Act 2002). As Riz Mokal points out in 'The Floating Charge – A Eulogy', this ability to bring in outside management to an ailing business may benefit not only the secured creditor, but also the business itself and other creditors (always assuming it succeeds in rescuing the business or minimising the loss caused by its collapse).

18.1.3. Efficiency

This brings us to the question of whether the prevalence of secured credit in this country is a good thing. There is considerable academic dispute about whether or not secured lending is efficient. Intuitively, it seems likely that it is, because it has been so pervasive in market economies for such a long time (see, for example, the argument to this effect in White, 'Efficiency Justifications for Personal Property Security', pp. 479–80). But efficient for whom? It seems fairly obvious that it is efficient for the secured creditor, in that the risk of not recovering the loan in full is decreased. This should result in lenders charging a lower rate of interest for secured

loans, which suggests that secured credit is more advantageous for borrowers as well. However, while the risk of not being repaid in full is decreased for the secured creditor, it is correspondingly increased for all the unsecured creditors of the same debtor, because the secured assets are removed from the pool of assets out of which they can be repaid. So, at best, unsecured creditors will increase the rate of interest they charge the debtor by an amount corresponding to the discounted rate charged by the secured creditor, and secured credit then becomes merely a 'zero sum game'. Even in such a case, the outcome is likely to be inefficient rather than neutral because setting up security arrangements is costly, so the debtor's total credit bill (i.e. adding together the costs of both the secured and the unsecured credit) will be greater in a world where secured credit is permitted than it would be in a world where it is prohibited. At worst – and this is rather more in line with what actually happens in the real world – some of the unsecured creditors will be unable to respond to the granting of secured credit by raising their interest rates (because they are involuntary creditors, or are not in a position to negotiate or renegotiate the terms on which they extend credit). This benefits the debtor, but it does mean that the advantages to the debtor and the sophisticated and relatively affluent creditor are bought at the expense of the relatively poor and unsophisticated creditor. In other words, it may be the case that secured credit is pervasive, not because it is efficient overall but because it permits 'informed' creditors to capture wealth at the expense of 'uninformed' ones. These arguments are developed in more detail in Scott, 'A Relational Theory of Secured Financing', and in Schwartz, 'Security Interests and Bankruptcy Priorities'.

However, there are other benefits that secured lending brings. We have already noted that the monitoring and control functions that security enables the creditor to undertake can benefit everybody. Further, the overall costs of monitoring and regulating debtor behaviour may be reduced, as argued by Jackson and Kronman, 'Secured Financing and Priorities Among Creditors'; and see also White, 'Efficiency Justifications for Personal Property Security', and, more generally, Mokal, 'The Search for Someone to Save'. Whether these advantages outweigh the disadvantages remains a matter of debate.

18.1.4. Use of security

Statistics produced by the Council of Mortgage Lenders (CML) and the Office of the Deputy Prime Minister reveal that, in 2003, CML members (estimated to provide approximately 95 per cent of residential mortgage lending) held just under 11.5 million mortgages of UK dwellings, at a time when there were approximately 18 million owner-occupied dwellings in all in the UK. According to figures published by the Bank of England, total outstanding secured lending to individuals and housing associations at November 2003 was over £750 billion, and the CML reports that new loans totalling over £200 billion were made by its members in 2002 and secured by mortgages over dwellings. Mortgage debt secured on dwellings accounted for over 50 per cent of GDP in the UK in 2001, the fourth highest in

Europe (Denmark was top with 70 per cent of GDP and Italy bottom with 10 per cent: European Mortgage Federation).

During the eleven-year period from 1991 to 2002, enforcement of mortgages of dwellings ranged from a low of 11,970 (0.11 per cent of total mortgages) in 2002 to a high of 75,540 (0.77 per cent of total mortgages) in 1991.

Comparable statistics are not available for security interests over other assets, but the Department of Trade and Industry's annual report for 2002/2003 shows that between 150,000 and 250,000 new mortgages and charges have been granted by companies every year since 1998. Most businesses are largely reliant on bank finance, and all UK banks routinely require security over business assets as a condition of extending credit.

18.2. Forms of security

It is important to keep in mind that the grant of a security interest generally involves two distinct transactions. By the first transaction, D borrows money from C or incurs some other obligation to C. By the second transaction, O, the holder of a property interest in an asset, grants C a security interest over it in order to secure D's obligations under the first transaction. O and D may, but will not necessarily, be the same person: you can mortgage your house to the bank to secure your own indebtedness to the bank or, if you want, to secure someone else's indebtedness.

Security interests that are granted consensually in this way must take one of four forms, as noted above. The significance of the differences between these forms appears from *Re Cosslett (Contractors) Ltd* [1998] 2 WLR 131 (extracted at www.cambridge.org/propertylaw/). An outline of the salient points follows.

18.2.1. Property transfer securities: the mortgage

Any property interest in any kind of asset can be mortgaged – i.e. any legal or equitable interest in land, in goods, or in any kind of intangible property. In the case of a mortgage of anything other than a legal estate in land, O mortgages her property interest to C by *transferring it* to C, with a proviso that C will transfer it back to O when the obligation is discharged. Since the transfer of title is by way of security only (i.e. for C to hold as security for performance of the obligation, rather than for C's own beneficial use), O is regarded by equity as retaining a proprietary interest (an 'equity of redemption') in the mortgaged property. This is a *sui generis* property interest, which amounts to an acknowledgment by equity that the mortgagor remains the 'true' owner notwithstanding the transfer of her interest to the mortgagee.

In other words, in a mortgage the mortgagor transfers ownership of the asset (or the whole of her interest, if less than ownership) to the mortgagee, retaining only the equity of redemption. In the case of goods, since ownership carries with it the right to possession of the goods, it is the mortgagee and not the mortgagor who is entitled to possession of the asset throughout the period of the mortgage. These

two factors combine to make the mortgage a most unsuitable form of security for goods, particularly from the mortgagor's point of view: she loses possession of the asset throughout the period of the mortgage, even if she does not make any default in repayment, and she has only an equitable interest in the asset which would not be enforceable against a good faith purchaser if the mortgagee were to sell the asset pretending it was his own. This creates problems, because none of the other forms of security is particularly suitable for goods either. The pawn tends to be used only for small, short-term domestic borrowings, as we see below, and the charge can only exist as an equitable interest, which leaves the chargee in a dangerously exposed position, with his interest not enforceable against a good faith purchaser if the chargor sells the goods without his consent.

Mortgages can be legal or equitable. A mortgage of a legal interest can be either legal or equitable depending on the formalities used (see Chapter 12 above). A mortgage of an equitable interest can only be equitable.

Since 1925, a legal mortgage of a legal estate in land (i.e. a fee simple absolute in possession or a legal lease) takes a special form, which we look at separately below.

18.2.2. Possessory securities: pledge or pawn

O pledges or pawns property by retaining title to it but delivering *possession* to C by way of security, on the condition that possession will be redelivered when the obligation is discharged. Since a pledge or pawn necessarily involves a delivery of possession, the only kinds of property that can be pledged or pawned are chattels and some documentary intangibles (in theory probably land as well, but never in practice). Again, the fact that pawn involves the delivery of possession limits its usefulness for commercial borrowers, but pawnbroking remains a thriving institution among consumer borrowers, providing relatively small loans for short periods usually against the security of personal belongings.

18.2.3. Hypothecations: the charge

A charge is the most sophisticated form of security. It has always been recognised in civil law systems but was never recognised by the common law. It was finally introduced into English law by equity, and as a consequence charges can only be equitable (leaving aside some statutory charges). A charge does not involve a transfer of ownership or a delivery of possession to C. Instead, what C gets is a *sui generis* proprietary interest in the charged property interest, which consists of a present right of first recourse to it in the event of a default in the performance of the obligation secured by the charge. So, from the moment the charge is created, the charged property is appropriated to, or earmarked for, the satisfaction of C's claim in priority to any other claim that anyone else might have in respect of it.

In many ways, the charge is the ideal form of security, since it gives the chargee only and precisely the rights it needs as against the security asset – i.e. a present right to have recourse to the asset only as and when there has been a default under the loan agreement and the chargee therefore wants to enforce the security. This is

in marked contrast to the cumbersome common law mortgage, which gives the mortgagee the inappropriately extensive rights of ownership of the security from the outset long before the mortgagee needs or even wants them. The disadvantage in our system, however, is the purely equitable status of the charge, as noted above.

Any kind of property interest can be charged. A charge may be 'fixed' (attached to a specific asset) or 'floating' (floating over all assets of a specified description from time to time owned by O). When a specified event (e.g. default in repayment) occurs, a floating charge 'crystallises', i.e. it attaches as a fixed charge to every asset of that description which O then owns. Floating charges, like fixed charges, are equitable only, and they can only be created by companies: an individual cannot grant a floating charge over her assets. The juridical nature of the floating charge is controversial, as can be seen from *Agnew* v. *Inland Revenue Commissioner* [2001] UKPC 28, PC (extracted at www.cambridge.org/propertylaw/).

18.2.4. Liens

The term 'lien' covers a variety of different, very specialised types of security interest, but the essential idea of a lien is that C becomes entitled to *detain* property of O until O's obligation is fulfilled, as Lord Millett explains in *Re Cosslett*. Most liens are non-consensual (e.g. maritime liens, unpaid vendor's lien, repairer's lien, solicitor's lien) but they can be created by agreement.

18.2.5. Property retention securities

A sale of property by S to B may be structured in such a way that title or possession passes to B before the full purchase price is paid, but S retains a proprietary interest in the property to be sold pending full payment. The interest retained by S in such a transaction (e.g. under a hire-purchase or conditional sale agreement, or a retention of title clause) is in all essentials a security interest, but the courts have sometimes been sympathetic towards attempts to characterise it as something else (most notably, in *Aluminium Industrie Vaassen BV* v. *Romalpa Aluminium* [1976] 1 WLR 676, where the court accepted that the seller's nominal retention of title until paid in full did not amount to a charge created by the buyer; this led to the widespread adoption of such provisions in continuing supply contracts: see Goode, *Proprietary Rights and Insolvency in Sales Transactions*, pp. 84–110).

18.2.6. Charge by way of legal mortgage

This is now, in practice at least, the only way of creating a legal security interest over a fee simple or leasehold interest in land. In order to understand the way it functions it is, unfortunately, necessary to understand its historical origins.

Until 1925, the ordinary property-transfer mortgage noted in section 18.2.1 above was used to mortgage fee simples and leases in English law. However, in 1925 it was thought that this form of mortgage would not fit well into the land registration system introduced by the Land Registration Act 1925, because under such a mortgage the owner has only an equitable (and therefore unregistrable)

interest, i.e. the equity of redemption. It was therefore decided to replace it with a new charge-like security interest, the charge by way of legal mortgage. However, it was feared that the immediate and compulsory replacement of the mortgage with this new type of security interest would be too radical a step for most lenders to take willingly. The mortgage by demise, a less radical modification of the property-transfer mortgage, was therefore also introduced at the same time, as an alternative to the charge by way of legal mortgage. It was anticipated that, as the advantages of the new charge by way of legal mortgage became apparent, use of the mortgage by demise would decline and it would eventually fall into disuse. This did indeed happen. It became obsolete (in about the 1960s or 1970s), and the Law Commission recommended its abolition in its report, *Transfer of Land: Land Mortgages* (Law Commission Report No. 204, 1991). This has not yet happened, but the Land Registration Act 2002 has now made it impossible to create a mortgage by demise over a registered title (see section 23(1) of the 2002 Act). Since a legal mortgage of a registrable estate is an event that triggers first registration of title, as we saw in Chapter 15, this means that in practice a mortgage by demise can no longer be created, even if anyone wanted to do so. However, its ghost lives on, because in the Law of Property Act 1925 the charge by way of legal mortgage is defined in terms of the mortgage by demise: section 87(1) provides that:

> Where a legal mortgage of land is created by a charge . . . by way of legal mortgage, the mortgagee shall have the same *protection, powers and remedies* . . . as if [the mortgage was a mortgage by demise].

Since nothing else is said in the 1925 Act about the nature of this new statutory creation, the charge by way of legal mortgage, or the rights, duties and obligations of the parties to it, this can only mean that they are the same as they would have been under a mortgage by demise, and indeed this is the approach that the courts have always adopted (see, for example, *Grand Junction Co. Ltd* v. *Bates* [1954] 2 QB 160, *Regent Oil Co. Ltd* v. *J.A. Gregory (Hatch End) Ltd* [1966] Ch 402, and *Thompson* v. *Salah* [1972] 1 All ER 530).

It therefore remains necessary to understand the mortgage by demise. The idea behind it was to modify the property-transfer mortgage only so far as necessary to give both mortgagor and mortgagee a legal registrable interest. Consequently, section 85(1) of the Law of Property Act 1925 provides that the mortgage by demise operates as a grant to the mortgagee of a legal lease of the land for a term of 3,000 years, but subject to 'cesser on redemption' (i.e. the term automatically terminates on repayment of the indebtedness). This leaves the mortgagor with a technically unwieldy bundle of rights consisting of a legal freehold reversion on a 3,000-year lease, plus an equity of redemption, plus an equitable right to redeem. These are, therefore, the rights that mortgagor and mortgagee have under a charge by way of legal mortgage. As the Law Commission pointed out in paragraphs 2.17–2.18 of *Transfer of Land: Land Mortgages* (Law Commission Report No. 204, 1991), this is deeply unsatisfactory since it leaves both parties with inappropriate rights:

INAPPROPRIATENESS OF FORM

2.17. The second root cause of the artificiality and complexity of mortgage law is that the methods used to create security interests in land give rise to inappropriate relationships between the parties. This is particularly apparent in the mortgage by demise . . .

MORTGAGE BY DEMISE

2.18. The problem here is of central importance because it affects not only the mortgage by demise, but also the charge by way of legal mortgage which is treated by statute as if it were a mortgage by demise, and the equitable mortgage of a legal estate, which is treated in equity as if it were a legal mortgage, and hence a mortgage by demise. The problem is that it creates a relationship of landlord and tenant between the parties. There is nothing unusual about using the leasehold relationship as an investment device: institutional lenders are probably more likely to use leases rather than mortgages as a means of financing property development or investing in non-residential land. However, in the case of the mortgage by demise the leasehold relationship is the wrong way round: as tenant, the mortgagee has an inherent right to possession which would more appropriately lie with the mortgagor (subject to whatever restrictions may be necessary to protect and enforce the security). Similarly, it is necessary for the preservation of the security that the mortgagor should be under a duty to the mortgagee to keep the property repaired and insured, yet this is a duty more usually imposed by a landlord on a tenant, rather than by a tenant on a landlord. Even if reversed, the landlord–tenant relationship is fundamentally different from that created by a mortgage: investors under a lease-based arrangement buy outright a share in the property, and the value of the share fluctuates in direct proportion to the value of the retained property; mortgagee-investors, on the other hand, have an interest in the property only for the temporary purpose of safeguarding the repayment of a loan or performance of an obligation, and the value of the mortgagee's interest can never exceed the value of the obligation secured. Historically, the mortgage by demise was a useful device to bridge the gap between abolition of the mortgage by assignment and general acceptance of the legal charge. Now that it has fulfilled that purpose, it seems an unnecessary impoverishment of the system to blur the distinction between lease and mortgage by continuing to define one device in terms of the other.

In the charge by way of legal mortgage (and indeed the mortgage by demise), significant modifications are made by the Law of Property Act 1925 to the basic leasehold relationship created by the security. So, for example, the mortgagee is given a statutory power to sell the mortgagor's interest in the land free from the mortgage (section 101(1)(i): applies to all mortgages and charges made by deed) and the mortgagor is given a limited statutory power to grant leases (section 99: without such a power it would lack the capacity to do so). Also, as we see later, sometimes equity will modify the mortgagee's common law rights to make them exercisable only for the protection or enforcement of the security. And finally the parties may, and frequently do, exclude or vary both the common law rights and the statutory modifications of them by express provision in the mortgage documents.

Notes and Questions 18.1

Read *Re Cosslett (Contractors) Ltd* [1998] Ch 495; [1998] 2 WLR 131; [1997] 4 All ER 115, CA, and *Agnew* v. *Inland Revenue Commissioner* [2001] UKPC 28; [2001] 2 AC 710; [2001] 3 WLR 454, PC, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:

1 Another aspect of the dispute which was the subject of the Court of Appeal decision in *Re Cosslett* was litigated in different proceedings on the same facts, and the House of Lords approved Millett LJ's analysis in *Re Cosslett*: see *Smith* v. *Bridgend County Borough Council* [2002] 1 AC 336; [2001] UKHL 58.

2 Explain why, according to Millett LJ in *Re Cosslett*, the agreement between Cosslett and the council did not transfer ownership of the plant to the council, and why it did not give rise to a mortgage, pledge, lien or fixed charge in favour of the council. Precisely which elements of the agreement gave rise to a charge in favour of the council?

3 Assume you own a valuable painting, and you want to offer it to your bank as security for a loan. Which type of security interest would be most appropriate? Which would be best from your point of view – a mortgage, a charge, a pawn or a lien? Which would you expect the bank to prefer?

4 Explain the difference between a fixed charge and a floating charge. According to Millett LJ in *Re Cosslett* and in *Agnew*, what are the determining characteristics of a floating charge?

5 Despite Millett LJ's analysis, the precise nature of many aspects of the floating charge remains controversial. In particular, there are conflicting analyses as to the nature of the interest the chargeholder (i.e. the lender) has in the assets before crystallisation. The question at issue is whether the chargeholder can be said to have a proprietary right in the assets before crystallisation. Nolan summarises the arguments in 'Property in a Fund', and concludes that it does, suggesting an analogy with a trust fund. The analogy is not wholly convincing, however. A trust fund is a fund held entirely for the benefit of the present and future beneficiaries, whereas assets subject to a floating charge are not held for the benefit of the chargee. It therefore makes sense to regard the chargee's right of recourse to the assets as inchoate before crystallisation, whereas it would be quite wrong to regard the interest of a beneficiary under a trust in that way.

6 It has been argued that a floating charge over all the assets of a company gives the chargeholder an unfair monopoly over the provision of credit to the company. Explain why, and consider the validity of the argument. Might this help explain why individuals cannot grant floating charges over their assets?

18.3. Control over the terms of the relationship

18.3.1. Equitable supervisory jurisdiction

There is a long-established equitable jurisdiction to strike out terms of a security interest which are inconsistent with its nature as a security interest. The jurisdiction applies to all types of security interest over any kind of property. The scope of the jurisdiction was settled in a series of major cases in the nineteenth and early twentieth centuries, in very different social and economic conditions, and there is some difficulty in applying the principles they established in present conditions.

Equity's historic intervention in mortgage and loan transactions was influenced by three principal factors. We have already noted the first: the excessive and inappropriate legal rights a mortgagee has always had in the mortgaged property because of the nature of common law security interests. The common law never devised a *sui generis* security interest, it merely utilised inappropriate property interests and relationships such as ownership, lease and bailment (for the pawn). This explains equity's creation of the equity of redemption (a development chronicled by Sugarman and Warrington in 'Telling Stories: Rights and Wrongs of the Equity of Redemption' (Extract 18.1 below); and see also Lord Parker's narration in *Kreglinger* v. *New Patagonia Meat & Cold Storage Co. Ltd* [1914] AC 25, extracted at www.cambridge.org/propertylaw/). It also explains equity's recognition of the charge as a security device.

The second factor was a deep-rooted distaste for the underlying bargain, usually a contract for the loan of money at interest. As Paddy Ireland relates in 'Company Law and the Myth of Shareholder Ownership' (Extract 18.2 below), usury was for a long time prohibited in this country, then prohibited unless licensed under the Moneylenders Acts, and, whether licensed or not, interest rates were regulated with a prescribed maximum rate. Lord Haldane and Lord Parker assess the significance of this point in *Kreglinger* in the passages extracted at www.cambridge.org/propertylaw/.

The third factor was that, at least at the beginning of the period of equitable intervention, mortgagors tended to be regarded as needing and deserving protection. It was partly a question of perceived inequality of bargaining power ('necessitous men are not free men'), but more because the weaker party was a landowner, as were most of the judiciary, whereas the stronger party was a moneylender or financier. In this early period of development most of the judiciary would have considered it a great social evil for a landed estate which had been in the same family for generations to fall into the hands of moneylenders through the enforcement of a mortgage, as Sugarman and Warrington note in Extract 18.1 below.

These second and third factors were particularly strong during equity's most active period of development, and during that time quite a high level of equitable intervention in mortgage transactions developed. But, by the mid to late nineteenth century, attitudes were changing. Provision of credit was beginning to be regarded as a social and economic good rather than as pernicious, and the

judiciary's class identification with mortgagors had begun to break down. Mortgage relationships no longer all fitted into the traditional landowner/moneylender stereotype, and in any event judges began to be drawn from professional classes instead of from landed families (a development noted by Manchester, *A Modern Legal History of England and Wales 1750–1950*, p. 81), and were therefore as likely to identify with bankers and merchants as with landowners, if indeed it was any longer accurate to draw such a distinction. So, from the middle of the nineteenth century, the courts were increasingly uncomfortable with the equitable interventionist principles they had developed, and began to qualify the protection they provided. *Kreglinger* v. *New Patagonia Meat & Cold Storage Co. Ltd* [1914] AC 25 epitomises the turn away from protectionism, and the principles it establishes are essentially those still applicable today.

The problem is that the pattern of secured finance today is as far removed from that which was developing at the time when *Kreglinger* was decided, as the latter was from the pattern which existed when equity first started to intervene in mortgage transactions. Even within the limited field of land mortgages, there are at least three very different secured credit markets. We have already noted the routine financing of virtually all commercial sectors by secured credit, and the vast house-purchase and home-improvement loan markets. The latter in particular is remarkably low-risk, lucrative and highly competitive. On the other hand, there is also a significant market for high-risk last-resort secured lending of the type described by Dyson LJ in *Broadwick Financial Services Ltd* v. *Spencer* [2002] EWCA Civ 35 (extracted at www.cambridge.org/propertylaw/). The type and level of protection appropriate is quite different for each of these three sectors, and that provided by the *Kreglinger* principles is not particularly apt for any of them. Also, there is the complicating factor that the courts are wary of doing anything that would have an impact on the supply of credit, understandably unsure whether increasing or varying equitable protection principles will have unwelcome social and economic consequences.

18.3.2. The *Kreglinger* principles

The parties in *Kreglinger* emphatically did not fit the landowner/moneylender stereotype. The borrower was a manufacturer – meat preservers and canners, and renderers of animal products – and the lender was a woolbroker, i.e. an intermediary between sheepskin producers such as the borrower and manufacturers of wool/sheepskin products. The woolbroker lent the meat company £10,000 (not repayable for five years if no default, although the borrower could repay earlier if it wanted) at an interest rate of 6 per cent, and the meat company also granted the woolbroker a right of pre-emption on all its sheepskins for five years, the woolbroker to pay the 'best market price' for all sheepskins it chose to buy *and* to receive 1 per cent 'commission' on all those it did not buy and which the meat company sold elsewhere. To secure repayment, the meat company granted the woolbroker a floating charge over all its assets. The meat company repaid early, and then wanted

to be freed from the right of pre-emption, claiming that it fettered its right to redeem (since if it redeemed within five years, it would not get back everything it mortgaged) and also that it gave the lender an improper collateral advantage in addition to repayment of its capital with interest. The House of Lords refused to intervene. Lord Haldane rationalised the principles on which equity would intervene in a mortgage transaction down to four. In his formulation (different formulations appear in the other judgments, a fertile source of dispute in later cases) the applicable principles are as follows:

1 Once a mortgage, always a mortgage. In other words, transactions which are in substance mortgages will be treated as such, even if they take some other form. So, for example, an apparent sale will be set aside if it took place only as security for an obligation, and that obligation has now been fulfilled, albeit too late.
2 Once the prohibition against usury was abolished in 1854, the parties to a mortgage are entitled to bargain for an additional advantage to be given to the lender *during* the mortgage (i.e. an advantage additional to repayment of capital plus interest) provided it is not unconscionable (variously expressed as 'imposed unfairly or oppressively' or as 'harsh and unconscionable', and see also Lord Parker at pp. 54–5 and 56 on this). This is just part of the general equitable jurisdiction to interfere in unconscionable bargains, not restricted to mortgages. This principle is, however, subject to the third principle, as follows.
3 Any term will be void in so far as it makes the mortgaged property 'irredeemable' – i.e. it removes, or fetters, the mortgagor's right to have the mortgaged asset back, free from any interest of, or obligation owed to, the mortgagee, by paying off everything due. The terms likely to have this effect are:
   a. a term which postpones the mortgagor's right to repay the loan, or perform the obligation, for an unduly long period;
   b. a term which confers on the mortgagee an advantage which continues *after* repayment, on the basis that this would deter the mortgagor from repaying (what is the point of repaying capital if you still have to go on, in effect, paying for the loan?), or alternatively that, having performed his obligation as agreed, the mortgagor ought to be able to get his asset back free from the mortgage;
   c. a term which gives the mortgagee an option to purchase the mortgaged property, or some interest in it which continues after repayment;
   d. a term which amounts to a penalty for early or late repayment.

In Lord Haldane's view, none of these principles was violated here. Principle 3(b), which seems a likely candidate, was inapplicable in his view because the sheepskin transaction was not a term of the mortgage at all but a separate transaction 'outside and clear of the mortgage', as Lord Parker put it (a difficult conclusion to accept, given that the security interest was a floating charge covering all the assets of the borrower, including its sheepskins). As later cases have demonstrated, it is easier to state this distinction than to apply it (see, for example, *Jones* v. *Morgan* [2001] EWCA Civ 995, and *Warnborough Ltd* v. *Garmite Ltd* [2003] EWCA Civ 1544,

both concerning options to purchase the mortgaged property contained in commercial financing transactions, and the discussion by Alan Berg, 'Clogs on the Equity of Redemption – Or Chaining the Unruly Dog').

Lord Haldane's second principle is the one most frequently relied on by mortgagors complaining about high interest rates and other exorbitant payment terms. However, it has been established that this principle is applicable only where the terms complained of were *imposed* in a morally reprehensible manner (*Multiservice Bookbinding* v. *Marden* [1979] Ch 84). This has two consequences. First, however high the interest rate, and however harsh the repayment terms, the courts are most unlikely to interfere if the borrower was independently advised, or had other means of appreciating the financial significance of what it was doing. Secondly, it makes the principle inapplicable to excessive repayments arising out of the way in which the mortgagee exercises its right to vary the interest rate unilaterally. Variable interest rate mortgages are common in this country. Sometimes the mortgagee's right to vary the rate is contractually restricted in some way, so that, for example, the rate must remain within a specified range, or must follow variations in market rates. In other cases, however, there are no such restrictions. Lord Haldane's principles are of no use here, and it has been left to the common law to step in to make up the deficiencies in the equitable protection. In *Paragon Finance plc* v. *Staunton and Nash* [2002] 1 WLR 685, CA (extracted at www.cambridge.org/propertylaw/), the Court of Appeal held that, where the agreement allows the mortgagee to vary the interest rate at its absolute discretion, there is an implied term, first, that rates of interest will not be set dishonestly, for an improper purpose, capriciously or arbitrarily (*per* Dyson LJ at paragraph 36), and, secondly, that the lender will not exercise its discretion to vary the rate of interest in a way that no reasonable lender, acting reasonably, would do (paragraphs 41–2). It will be noted, however, that this was of no help to the borrowers in that case. Their interest rate, originally 2 per cent above the rate charged by the Halifax Bank, was increased to 5.14 per cent above the Halifax rate (so that they were paying 12.09 per cent when the Halifax was charging 6.95 per cent), but this was held not to be in breach of the implied term, for reasons apparent from the extract from Dyson LJ's judgment given at www.cambridge.org/propertylaw/.

18.3.3. Statutory intervention

Largely as a result of the equitable jurisdiction's failure to adapt to the conditions of twentieth-century secured lending, some statutory regulation has been introduced, most notably by the Consumer Credit Act 1974. The Consumer Credit Act 1974 contains two sets of provisions relating to mortgages. The first set applies *only* to mortgages 'securing a regulated agreement' (in effect, only second mortgages securing loans not exceeding £25,000). These provisions impose detailed requirements about the form and content of the documentation, how and when documents are to be executed, and provision for printed warnings and cooling-off periods. These provisions are currently under review by the government.

The second set – the extortionate credit bargain provisions contained in sections 137–139 – apply to *all* mortgages where the borrower is an individual. There is no monetary limit. The scope of these provisions, and their limited effect in practice, is apparent from *Broadwick Financial Services Ltd* v. *Spencer* [2002] EWCA Civ 35 (extracted at www.cambridge.org/propertylaw/). In particular, it should be noted that they have been largely ineffective in controlling interest rates. The first reason for this is that it has been held that sections 137–139 share the defect of the equitable jurisdiction noted above: they do not cover the way in which lenders *operate* the terms of the agreement, notably by varying interest rates (see *Paragon Finance* again, in the passages cited in *Broadwick*). The second reason, however, is fundamental. The courts have taken the view that, in deciding whether an interest rate is 'extortionate', the appropriate comparable is the market rate charged *by that type of lender to that type of borrower*. Consequently, different sectors of the secured lending industry (including those at the shadier end of the spectrum) have been left free to set their own market rates. Only those who step out of line from their own market risk intervention under the 1974 Act.

The other source of statutory regulation is the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999 No. 2083), which apply to security interests, and which may prove to have some impact on standard form mortgage terms. They replace the 1994 Regulations of the same name (SI 1994 No. 3159), which implemented Council Directive 93/13/EEC on unfair terms in consumer contracts. It was not clear how far the 1994 Regulations applied to land transactions, but they certainly applied to the terms of loans provided by institutions to consumers. Changes made by the 1999 Regulations now make it clear that the Regulations apply to all aspects of land transactions between 'professionals' and consumers, including all standard form mortgages. For consideration of the scope of the Regulations, reference should be made to the House of Lords decision in *Director-General of Fair Trading* v. *First National Bank plc* [2001] UKHL 52.

Extract 18.1 David Sugarman and Ronnie Warrington, 'Telling Stories: Rights and Wrongs of the Equity of Redemption', in J. W. Harris (ed.), *Property Problems: From Genes to Pension Funds* (London: Kluwer, 1997)

I. THE RISE OF THE EQUITY OF REDEMPTION

1. Mortgages and the equity of redemption

Historically, a mortgage arose where an owner of property (usually land) required money and arranged to transfer the property to a lender as security in return for a loan. The loan agreement would generally provide for a reconveyance of the property to the borrower at a specific date on repayment of the money borrowed and the interest due. If the loan was not repaid, the property became forfeited to the lender. At common law, the date for repayment had to be strictly adhered to. Even one day's delay in tendering repayment could result in the borrower losing the entire property to the lender, though the amount of the loan was far less than the value of the land.

This interpretative stance was challenged by the courts of equity. Dating from at least the turn of the seventeenth century, the courts of equity determined that the strict date for repayment was somewhat irrelevant. Accordingly, the lender's claim to the property became subject: 'to a right called the equity of redemption, which arose from the court's consideration that the real object of the transaction was the creation of a security for the debt. This entitled the [borrower] to redeem (or recover the property), even though he had failed to repay by the appointed time.'

Time was not to be the essence of the agreement. Although the mortgagor's legal right to redeem the property was lost after the expiration of the time specified in the contract, in equity the mortgagor had an equitable right to redeem on payment within a reasonable period of the principal, interest and costs. A reasonable period could in some cases span many years. The rights of the mortgagor were further enhanced by the rules governing foreclosure.

The discretion to allow the borrower to get back property notwithstanding the contractual terms soon hardened into a right. In addition to this right (the fully fledged equity of redemption), the courts developed various analogous protections for borrowers. Partly under the umbrella of that seemingly tautological maxim of equity, 'once a mortgage always a mortgage', the courts also laid down that the borrower's right to get property back could not be rendered ineffective either by postponing the right for some unacceptable period or by making the right subject to some penalty, such as the borrower being deprived of some or all of the property mortgaged on exercising the right to redeem. What became known as a 'collateral advantage', that is, the lender asserting a claim to some or all of the borrower's property irrespective of repayment of the loan, was outlawed.

2. The establishment of the equity of redemption

It is generally agreed that the exact origin of the equity of redemption in its modern form is probably lost. A. W. B. Simpson suggested that the Chancery courts were prepared to relieve mortgagors from strict forfeiture conditions from the fifteenth century (Simpson, *An Introduction to the History of the Land Law* (1961), p. 227). But although there are examples to support this, these probably relate to what Simpson calls 'peculiarly scandalous cases'. The most common example of this would be where the mortgagee was repaid entirely from the rents and profits of the property and still refused to reconvey the property to the mortgagor. Richard Turner, the leading historian of the equity of redemption, concluded that the equity of redemption arose during the reign of Elizabeth I (Turner, *The Equity of Redemption* (1931)). While the court of Chancery did grant relief to mortgagors during this period, there are only two reported decisions where relief was given after a forfeiture. It was probably not until the start of the seventeenth century that courts began to grant relief to borrowers as a matter of course, without looking for the special circumstances that would have previously been necessary to activate equity's conscience. The courts gradually extended the list of circumstances that they regarded as causing the special hardship necessary for the court's protection. Thus, the jurisdiction to intervene which had originally operated only in exceptional circumstances became the rule; and the cases where no relief was granted became the exception. Despite the attempts of the

Commonwealth Parliament to limit the effectiveness of the right to redemption, and the effort of common lawyers to defeat the equity of redemption on the grounds that it was only a mere chose in action, that is, not a real property interest but merely a personal right recoverable by a suit at law, the mortgagor's claim to preferential treatment as against the mortgagee, irrespective of the terms of the contract, was established.

3. The jurisdiction consolidated

The courts quickly established that the mortgagor (the borrower) could not be prevented from redeeming, either before or after the contractual redemption date. Put simply, the date was fully effective against the lender, but rather less than effective against the borrower. Although later courts stressed that in certain circumstances the mortgagee may be prevented from redeeming early, the vital principle that a mortgagor cannot be prevented from seeking the return of the mortgaged property has been taken to be established in the seventeenth century by Lord Nottingham.

Lord Nottingham was instrumental in starting the shift of the equity of redemption from a 'thing' to an 'estate' in equity, that is, in conceptualising the equity of redemption as a kind of real property rather than as a kind of chattel property. Increasingly, mortgagors' claims were given precedence over other interests to which they had earlier been postponed: for example, mortgagors' claims came to take precedence even over a real property claim like the wife's right to dower. In *Attorney-General* v. *Pawlett* (1667), Lord Hale first characterised the equity of redemption as a title in equity. According to Lord Hale, a trust was contractual in nature, while the equity of redemption was proprietorial ...

Despite these legal developments, numerous lenders tried to circumvent the equitable protections. But time and again the courts stressed they would strike down the actual terms of a contract. Claims that the mortgage had subsisted for too long to permit a redemption were also rejected. Nor were the courts impressed when the mortgagee claimed to have suffered particular hardship or taken unusual risks. This justice was not an abstract principle. It turned upon the assumptions of those who were deciding what was or what was not 'just'. And, for most judges most of the time, justice in this context meant the restoration of landed property to the original owner.

As already suggested, Turner reduces much of his history of the equity of redemption to the 'personality' of the Chancellors. This allows him to move straight from Lord Nottingham, the father of the equity of redemption, to Lord Hardwicke, who became the most important figure in the story by 'consolidating' the work of Lord Nottingham. Lord Hardwicke's influential tenure as Lord Chancellor from 1736 to 1756 helped to settle equity as a system of general rules. If nothing else, Lord Hardwicke's claim to the central position in the story is assured by his famous decision in *Casborne* v. *Scarfe* (1735). While this case is by no means the first to define the equity of redemption as an estate, the importance of the equity of redemption as the equivalent of ownership limited through time is fundamental. It provided the legal foundation to underpin the 'fairness' of the courts' interference in contract. Not only was this just, it was technically correct. Although doubts lingered in the minds of some judges for a century or more as to the accuracy of characterising the equity of

redemption as an estate, for practical purposes they were of no further significance. By 1822, Thomas Coventry could write as incontrovertible: 'An equity of redemption will follow the custom as to the legal estate.'

A similar transformation took place to the rules governing what were termed 'collateral advantages'. These rules policed any additional benefit that the mortgagee had extracted from the mortgagor, additional that is to the interest and the principal owed to the mortgagee. As with the rules relating to attempts to limit rights to redeem, anything that allowed the mortgagee the slightest opportunity of obtaining the mortgaged property itself was, by definition, oppressive or unjust.

When doubts were cast on these decisions by Lords Lindley, Romer, Jessel and others at the end of the nineteenth century, many reasons were given as to why the collateral advantage rules should not be followed. But, as we shall see, the crucial thing was that the late nineteenth-century courts no longer found these decisions 'just' or 'reasonable'. According to Lindley LJ, delivering judgment in 1898, to call a normal collateral agreement unconscionable, 'would shock any business man'. Perhaps it would, and in this area at least, so far as his Lordship was concerned, what did not shock a business man did not shock him.

In summary, the general effect of the rules governing the equity of redemption was to protect the owners of landed wealth as far as possible. The rules never purported to allow borrowers to escape from the actual debts they contracted, but the courts took it upon themselves to decide the limits beyond which lenders of money secured on landed estates could not go. In the mid-nineteenth century, the jurisdiction was seemingly incontrovertible. Even as late as 1912, Lord Halsbury spoke of 'this equitable doctrine which, I agree, is now part of the jurisprudence of this country'.

4. Little short of ideal

Why was this highly interventionist jurisdiction fair; and how was it justified? Judges and jurists tended to adopt two intersecting rationales for this special jurisdiction. First, one distinctive strand of equity's broad and highly discretionary jurisdiction in fraud concerned the protection of young heirs. In these cases it would be argued that landed heirs should be relieved from their bargains to borrow money, convey land, buy horses, jewellery, etc., because these bargains were unconscionable and fraudulent. They were fraudulent and unconscionable because the young heir concerned was in 'necessitous circumstances'. Because they felt impelled to undertake the sort of bargains that others would scorn, they were the obvious targets of what were characterised as 'unscrupulous moneylenders' or 'rogues' selling goods at a high price. It was co-extensive with these developments that equity developed and consolidated the equity of redemption. The doctrine was intended to protect the landowner from the money-hungry activity of commercial interests. The anomalous character of this protection for the 'necessitous' is evident when one considers the many other instances in which starker necessitousness did not postpone debts due.

Secondly, it was emphasised that the court's function was to ensure that ultimately land was returned to its 'rightful' (often meaning historical or traditional) owner. Even when the terms of the contract unequivocally pointed to an agreement to transfer the

ownership of the land in exchange for money, goods or services, the courts were seemingly loath to accept it at face value.

As the story was told by Turner, the development of the equity of redemption was a minor miracle. Speaking of Lord Hardwicke's role in the development, he could hardly contain his enthusiasm. His Lordship had created a body of law that was 'fair', 'rational', and 'noble', 'a structure which soon became one of the most important features of English land law, having a far-reaching effect upon the internal economic position of the country'. Although Turner conceded that the end result was not quite up to the high standard of Roman law: 'The conceptions upon which the rules in application are based are sound in character and little short of the ideal.' He even allowed his enthusiasm to go so far as to suggest a comparison between the creation and development of the equity of redemption and the development of new symbols in mathematics making possible further advances into 'unknown realms of mathematical speculation'. Here was a doctrine that could indeed perform miracles.

Ironically, Turner completely failed to comprehend that this near perfect doctrine had been substantially recast by the House of Lords in *Kreglinger*, a case which he describes but whose significance escaped him. In this case, their Lordships sought to cut back the long-standing doctrine that all collateral advantages in favour of the mortgagee, that is, something granted to the mortgagee in addition to the return of the loan and interest, were invalid. These contracts were no longer viewed as automatically unfair and unconscionable. The result was that the equity of redemption had been significantly weakened. One conception of fairness (the fairness needed to protect and entrench the superior position of the landed oligarchy) had been largely supplanted by another conception of fairness (the fairness demanded by the financier) which appeared to demand the rigorous enforcement of the letter of contracts. Since Turner treated the development of the equity of redemption as intrinsically natural, desirable and superior, thereby abstracting the history of the doctrine from the context within which it was inscribed, he was unable to recognise that when circumstances changed the doctrine might no longer appear so natural and superior.

II. ANOTHER WAY OF SEEING: THE ECONOMIC, CULTURAL AND POLITICAL DIMENSIONS OF THE EQUITY OF REDEMPTION

1. England's patrician polity, the law of real property and myth-making

What were the particular circumstances that sustained the construction and expansion of the equity of redemption, and enabled the landed elite to exploit it? First and foremost was the fact that until the 1870s England was a 'patrician polity'. Until the 1870s, the landed establishment owned about four-fifths of the land in the British Isles. Their political, economic and cultural hegemony was exemplified by their pre-eminence in government, parliament, the law, the church, the civil service and the armed forces.

In Britain, land was sacred: it denoted status and citizenship. Most landowners were faced at some time or other with pressure to sell their land. Writing in 1827, Sir James Graham recognised the problems that heavy indebtedness caused many country gentlemen, and conceded that sale was a possibility:

> But what agony of mind does that word convey? The snapping of a chain, linked perhaps by centuries, the destruction of the dearest attachments, the dissolution of the earliest friendships, the violation of the purest feelings of the heart.

This reluctance to sell was part of a larger ethos: namely, the landowners' desire to create and maintain a dynasty. As Edmund Burke put it, land ownership was: 'a partnership not only between those of the living, but between those who were living, those who were dead, and those who are to be born.' Most large landowning families schemed with varying degrees of success to ensure that the interests of future generations were secure. The legal system played a decisive role in these developments. As Maitland observed, 'our whole constitutional law seems at times to be but an appendix to the law of real property'.

The landed elite and the law were intensely bound together. From 1621 until 1844, the kingdom's supreme judges were not the professional lawyers of Kings Bench or Chancery but England's nobility assembled in parliament. The largest owners of property became the highest judges of the law of property. Even after 1844, England's most senior judges and law officers continued to be peers in part because the House of Lords remained the kingdom's supreme court of judicaters. The close relationship between the landed establishment and the law was reinforced by the fact that a significant proportion of the aristocracy took up the law in some form up to as late as the 1880s.

In myriad ways the law constituted and symbolised the elevated position of the landed establishment. Of major importance to the landed oligarchy was the fabrication of a system of equity alongside the common law from the fifteenth century onwards. The Court of Chancery was the great conduit of this equitable jurisdiction, a jurisdiction which tended to moderate the rigidities and formalism of the common law, particularly as it affected the landed. The close relationship between land and the law was further entwined with the privatisation of the process by which land ownership was transferred (conveyancing). In an elaborate process of judicial construction, the Statute of Uses of 1536 was interpreted so that conveyancing came to be undertaken by private contract, designed and overseen by lawyers, rather than involving the supervision of the courts. Nowhere was this dependence upon the legal profession more evident than in the extensive use that large land owning families made of the strict settlement, a legal device developed during the seventeenth century to forestall estate fragmentation.

The attitude that it was the landowners' natural privilege to take loans on security and then be relieved from the terms of the bargain, persisted until well into the nineteenth century. Lord Guildford borrowed money at 60 per cent when an expectant heir and then successfully claimed that the strict terms of the bond that he gave against the expectancy should not be upheld. The exchange between counsel for the lender and Lord Guildford shows his Lordship denying that he even understood the meaning of '60 per cent'. 'I did not know whether it high or low interest; I thought money-lenders always charged that amount' he said. Asked whether he thought the rate too high, he replied: 'I think they ought to let me have money at a lower interest; because they know perfectly well that I was certain to come into the property, and that I could pay them and I was quite right to borrow the money if I wanted it.'

To emphasise the significance of England's landed polity does not require that we marginalise the significance of commerce, and from the late eighteenth century to the Thatcher era, Britain's industrial and manufacturing economy. The significance of credit, and the relations of mutual dependence that it gave rise to helped to bind together landowners, bankers and shopkeepers. Indeed, the equity of redemption helped to foster increased consumption and the expansion of credit by convincing more landowners that the risk of losing their property by way of mortgage was minimal . . .

5. The metamorphosis of the equity of redemption

As we have seen, there have always been some members of the judiciary who took issue with the doctrine of the equity of redemption even in its seventeenth and eighteenth-century heydays. These misgivings grow louder from about the middle of the nineteenth century. Those elements of resistance within the discourse itself were galvanised anew as a more middle class judiciary found themselves privileging a social group, the landed, who no longer seemed to need nor merit this privileging. The period from the late eighteenth to the late nineteenth century witnessed a 'shift in emphasis from property law to contract . . . [The] equation of general principles of contract law with the free market economy led to an emphasis on the framework within which individuals bargained with each other.' Law was one of several discursive processes which helped to forge these new representations of the social world and personhood, determining who could speak and how. These narratives celebrated commerce, the crucial economic role played by the middle classes, the freedom of the market, self-help and a less aristocratic notion of property and personhood. Freedom of contract served to fuse the tradition of the ancient constitution to a new emphasis on business and the town as the expressions of a liberal sense of evolutionary progress and national advance. These narratives presented the middle classes as the real guardians of society.

The members of the judiciary closely involved with the equity of redemption at the end of the nineteenth century and the beginning of the twentieth century had lost their aristocratic bias and were strong advocates of the new contract orthodoxy. The mortgagor it argued was 'usually a grown-up man, with a very clear vision of his own interests, and quite able to take care of himself even without the solicitor who is generally found at his elbow'. Hence, presumably, there was no need for the classic equity of redemption. For these judges, their role was not to protect one species of property, land, but to protect contractual rights generally, that is, to protect forms of property including rights in land, but not privilege rights in land. If the courts were still to interfere with bargains freely made as the equity of redemption demanded, what would happen to sacred *laissez faire* doctrines? Faced with these two apparently conflicting positions, the courts decided, after some hesitation, that freedom of contract as they understood it meant more to them than anything else, including the classic form of the equity of redemption. From this perspective, the metamorphosis of the equity of redemption was part of a late exorcism of sixteenth, seventeenth and eighteenth-century notions of the place of land and the landed in English property holding and a manifestation of alternative conceptions of justice and Englishness.

The victory of freedom of contract over property had less to do with the intrinsic superiority of the arguments concerned than the circumstances in which they were

expressed, which enabled certain groups to exploit them. From the Third Reform Act to the First World War, debates concerning citizenship intensified and progressive liberals sought to transcend the atomistic individualism of classic liberalism. In the eyes of old liberals like the constitutional lawyer, Albert Venn Dicey, the much-feared age of collectivism had arrived. From this perspective, the upholding of freedom of contract with respect to the equity of redemption, and by implication minimal state interference, was itself an attempt to entrench the individualism of classic liberalism in a period when it seemed increasingly under attack. Such, then, was the context within which the equity of redemption was reformulated by the House of Lords in 1914.

CONCLUSION

The belated metamorphosis of the equity of redemption, and therefore of the transformation of property, from older monopolistic forms of ownership grounded in the privileges of status to newer, contractual, individualistic and free-market forms of ownership, testifies to the tenacity of what some commentators have called the backward or feudal dimensions of modern English society. Yet, as with so much of English property law, its pre-modern form was deceptive and paradoxical. The tenacity of the equity of redemption demonstrates that in some areas of property relations commercial prosperity was parasitic upon the stability, strength and survival of the landed gentry. The mortgage, and the doctrine of the equity of redemption which accompanied it, facilitated both, on the one hand, the qualification, alienation and fragmentation of property, and, on the other hand, the concentration of landed wealth and more absolute and exclusive property rights. The rise and tenacity of the equity of redemption highlights some of the ways in which certain areas of property law privileged the rights of the landed for a longer time-span than is often assumed, yet, at the same time, fostered the extension of commercial contracts sustained by credit. From an economic perspective, the equity of redemption created a legal bulwark safeguarding land (and the landed) from the encroachments of capital, while helping to fashion the mortgage as a major vehicle for economic development. From a legal perspective, although the creation and development of the equity of redemption has been taken as exemplifying the law's increasing commitment to the notion of property as individual absolute dominion, it also illustrates the extent to which the law routinely fostered the qualification of property and restraints on alienation. Although the ideology of absolute private property denied those social and collaborative dimensions intrinsic to human endeavour, in practice the law continually threatened to undo the viability of one of the central tropes of eighteenth and nineteenth-century political discourse. In these ways it could be both feudal and modern.

Extract 18.2 Paddy Ireland, 'Company Law and the Myth of Shareholder Ownership' (1999) 62 *Modern Law Review* 32 at 34–7

USURY AND THE CONCEPT OF PARTNERSHIP

... Although the term usury eventually came widely to be used to describe any extortionate bargain, in its original sense it involved loaning money for interest. The

usurer was thus an antiquated version of what Marx later called the money capitalist, the only significant difference between usurer's capital and interest-bearing or money capital lying not in their form (both entail a movement from M – M1) but in the social relations of production within which the money moves. Frowned upon in Greek and Roman times and completely prohibited in the Middle Ages, the taking of interest on loans was later permitted but rates of return regulated by statute, at which point usury came to be identified with the taking of excessive interest rather than with taking interest *per se*. To the modern mind, with its acceptance of the intrinsic productivity of money, this antipathy to 'investment', to money as capital, seems a rather anachronistic theological prejudice, a quaint, pre-modern, superstition. In this context, the survival of the usury laws into the nineteenth century appears rather odd; an example of law lagging behind economy. However, while the hostility to usury can be traced back to biblical sources and came to constitute one of the principal elements of canon law, it had social and political, as well as religious, underpinnings. These were influentially outlined by Aristotle and remain relevant today.

For Aristotle, exchange was central to the social intercourse which made community, the prerequisite of human happiness, possible. By providing a standard of commensurability for unlike things, money facilitated exchange and thereby made an important contribution to social bonding. Usury, Aristotle argued, undermined money's ability to perform these functions and subverted the fairness in exchange which was 'the salvation of states'. It was, he claimed, 'unnatural', for money was inherently unproductive. Lacking genitals – 'organs for generating any other such piece', as Bentham put it – money was sterile and barren; of all the ways of getting wealth, 'money produced out of money . . . was the most contrary to nature'. The usurer made money without working for it, taking, in the form of interest, part of the product of the labour of others. Moreover, Aristotle argued, usury was also unnatural in the sense that the acquisition of money tended towards infinity and endless multiplication, encouraging greed for its own sake. One could, like Midas, have an abundance of money and yet still perish from hunger. For Aristotle, therefore, usury undermined justice in exchange, corrupted market relations and subverted the ethical roots of social, political and economic order. There were many later expressions of this view, among the most vivid, that found in *The Divine Comedy*, in which Dante located usurers, their faces charred beyond recognition by fiery rain, in the seventh circle of the Inferno at the very edge of the second division of hell, to reflect 'the degree to which [their] particular offense destroy[ed] communal life and the possibility of spiritual happiness'. In marked contrast to modern legal systems, Dante treated fraud more harshly than violence precisely because it eroded the trust and confidence without which community would disintegrate. The theory of usury which emerged in the Middle Ages was 'not, then, an isolated freak of casuistical ingenuity, but [a] subordinate element in a comprehensive system of social philosophy'.

The legal antipathy to usury can be traced back at least as far as Roman law. However, not only did Roman law permit usury as long as the interest charged was not excessive, it distinguished potentially usurious contracts of loan (*mutuum*) from other transactions in which payment for the use of money was considered legitimate, prominent among them the contract of partnership (*societas*). Over time, as trade

expanded and money came increasingly to be borrowed as well as lent as capital (rather than to meet an immediate material need), the legitimacy of many forms of 'investment' was established through an expansion of the scope of concepts such as partnership and a corresponding narrowing of the concept of the (potentially usurious) loan. The result was the legal constitution of many inactive providers of money as 'partners' rather than 'lenders', essentially on the grounds that they put their capital at risk. The concept of partnership that emerged – the 'one great and universal form of licit investment in commerce throughout medieval Europe' – entered scholastic thought 'largely in the form given it by Roman law'. Despite their desire to prohibit usury, therefore, for most canonists and jurists 'there was a world of difference between usury, [profit obtained from] a contract of loan ... and justifiable returns derived from partnerships, where there was a sharing of risk and venture of the capital'. Nevertheless, there was much disagreement (and confusion) among them as to the status of some contractual arrangements in which money was provided in return for a reward, particularly those in which the liability of investors to third parties was restricted. In 'analysing and systematising the law of usury for the first time', however, the canonists not only 'provided a rational foundation for the dramatic growth of commercial and financial life during the Middle Ages', they developed a very spacious theory of 'partnership' based around ideas of risk and ownership. It was encapsulated by Aquinas:

> He who commits his money to a merchant or craftsman by means of some kind of partnership does not transfer the ownership of his money to him but it remains his; so that at his risk the merchant trades, or the craftsman works with it; and therefore he can licitly seek part of the profit thence coming as from his own property.

According to this theory, if an investor of money shared the risk of a venture, the arrangement ceased to be a loan and became a partnership. As Patrick Atiyah points out, the concept of risk employed was rather odd for nobody who lends money is ever guaranteed to get it back. Under the theory, however, if, this inherent risk apart, the investor was promised his money back with an additional sum above that legally permitted, the transaction was a loan and potentially usurious. If, on the other hand, the return was neither guaranteed nor fixed in advance but depended on the success, or otherwise, of the venture, the investor was deemed a risk-taking partner. Usury thus entailed the idea of certain gain. As Aquinas emphasised, the issue of risk was itself bound up with the issue of ownership. In a loan arrangement, it was argued, the money lender transferred ownership of his money to the borrower, took a fixed and guaranteed return, and dispensed with the risk to his property; whereas in a partnership the provider of money retained ownership of his property and thus put it at risk. This not only justified his return, it made it possible to attribute it to the goods which the money had been used to buy, rather than to the sterile and barren money itself. In this way, over time, the usury laws contributed to the radical differentiation of two sorts of money investor: 'lenders' outside associations receiving interest; and 'partners' inside associations sharing profits.

The teaching of the canonists on usury was received in significant part into civil law, and in England, where 'any transaction which involved usury was clearly illegal in medieval common law', as late as the seventeenth century the legal conception of usury remained derivative of canon law. As the economic foundations of society changed, however, there gradually emerged more and more ways in which the usury laws could be circumvented and more and more methods of investment recognised as legitimate by both the religious and secular authorities, either by official declaration or by acquiescence. With this, the morality and legality of taking a return on money lent was increasingly accepted as long as only a moderate amount of interest and not *turpes usurae* had been charged. In a series of statutes passed in the sixteenth century, English law came effectively to permit the charging of interest of up to 10 per cent per annum; by 1713, however, this had fallen to 5 per cent, the level at which it remained for the rest of the century.

The result was that, during the eighteenth century, the formative period of the modern English law of partnerships, the usury laws, still 'feared and ... far from obsolete', continued to influence the characterisation of different forms of 'investment' in English law. Thus, although the law of partnership 'presumed that each partner was an active trader in a joint concern [with] full power to act as agent of his fellow partners', in accordance with the 'risk' theory of partnership the legal status of inactive providers of money *vis-à-vis* third parties was determined by reference to the content of their financial return rather than by reference to their involvement (or otherwise) in the running of the concern. As Blackstone J explained in *Grace* v. *Smith*:

> the true criterion (when money is advanced to a trader) is to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of the trade. In the former case it is a loan (whether usurious or not, is not material to the present question), in the latter a partnership.

Thus 'lenders' who received interest (a return 'certain and defined') were distinguished from 'partners' who received a share in profits (a return 'casual, indefinite and depending on the accidents of trade'), although both received the return on their capital in the same form – as a reward for the mere ownership of money.

Notes and Questions 18.2

Read *Kreglinger* v. *New Patagonia Meat & Cold Storage Co. Ltd* [1914] AC 25, *Paragon Finance plc* v. *Staunton and Nash* [2001] EWCA Civ 1466; [2002] 1 WLR 685; [2002] 2 All ER 248, CA, and *Broadwick Financial Services Ltd* v. *Spencer* [2002] EWCA Civ 35; [2002] 1 All ER (Comm) 446, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:

1 Examine the reasons given by each of their Lordships in *Kreglinger* for concluding that the right of pre-emption was not a part of the mortgage transaction. How convincing are they?

2 In *Knightsbridge Estates Trust* v. *Byrne* [1939] 1 Ch 441, it was held, applying the *Kreglinger* principles, that, in a mortgage between commercial parties

bargaining at arm's length, a postponement of the right to redeem for fifty years was valid. Consider whether, in present market conditions, it would still be considered legitimate to lock a borrower into a loan agreement for such a period.

3 Consider whether, applying the *Kreglinger* principles, it is legitimate for mortgagees to charge an 'early redemption fee' to borrowers who wish to redeem early. Such charges are commonplace in modern mortgages: consider how they can be justified.

4 Is it legitimate, applying these principles, to include a provision in a mortgage that the interest rate will increase by a specified amount if there is default in repayment? If not, would it be legitimate to provide for an interest rate *reduction* on prompt payment?

5 It is argued that it is inappropriate for the courts to intervene where mortgages impose excessive interest rates, first because the remedy for a mortgagor in such a case is to remortgage elsewhere, i.e. move to a different lender, and secondly because control over interest rates is already exerted by the state, in that lenders such as these must be licensed by the Director-General of Fair Trading who will revoke the licence of any lender operating unfair lending practices. Examine the response Dyson LJ makes to these arguments in *Paragon* v. *Nash*. Is there anything else that could be said?

6 Robert Walker LJ expresses the view in *Broadwick* that sections 137–139 of the Consumer Credit Act 1974 'fail to achieve their purpose of protecting consumers, and especially "non-status" borrowers who are unable to obtain credit on more favourable terms from primary lenders'. Consider why this is the case. Is he right in saying that the 'legislative safeguards' he mentions in paragraph 89 will not always solve the problem? Compare this approach with that adopted by the Director-General of Fair Trading in his Guidelines for Lenders on Non-Status Lending (1997) (available from www.fisa.co.uk) referred to by Dyson LJ above.

18.4. Enforcement of security

18.4.1. Remedies

By far the most important remedy for any security interest holder is private sale. In the case of land mortgages, it is sometimes preceded by the mortgagee obtaining a court order for possession (nearly always if the property is residential and occupied). It is also possible for mortgagees (and, as we see later, mortgagors) to apply for a court order for sale under section 91 of the Law of Property Act 1925, but this is rarely done.

A significant alternative enforcement measure for non-residential mortgages is the appointment of a receiver, who is technically the agent of the *mortgagor*

(section 109(2) of the Law of Property Act 1925) but whose function is to receive the income and/or to sell property in order to obtain repayment of the money owed to the mortgagee, as we see in *Downsview Nominees Ltd* v. *First City Corp. Ltd* [1993] 2 WLR 86, PC (extracted at www.cambridge.org/propertylaw/). The only other option – applicable only to mortgages, not to any other kind of security interest – is foreclosure, and this is no longer a practical proposition. It involves a court order extinguishing the mortgagor's interest in the mortgaged property, leaving the mortgagee as full legal and beneficial owner. This makes sense as a method of enforcing a property-transfer mortgage where the mortgagor's only interest is the equity of redemption, but even then it is capable of producing such startlingly unfair results that procedural safeguards had to be introduced which have complicated the procedure beyond the point at which it is usable, particularly as adapted to the enforcement of the mortgage by demise and the charge by way of legal mortgage. It is now obsolete, and has been for many years.

18.4.2. Possession

In land mortgages, the mortgagee is entitled to possession from the outset, as a matter of right, not just as a remedy. It is an inherent right, arising out of the mortgagee's status under the statutory charge by way of legal mortgage, which gives him all the rights he would have had if he held a 3,000-year lease as security. It is a right that the mortgagee does not need to exercise except for the purposes of protecting or enforcing the security, and indeed exercise of the right may well be confined to those circumstances by an express or implied term of the mortgage. In the absence of such a contractual restriction, however, the traditional view has always been that the mortgagee may take possession at any time and for any purpose and for any reason, and that equity will not intervene to restrict the exercise of the right.

Although this view has been reasserted repeatedly by the courts (for example, in, but certainly not confined to, *Four-Maids Ltd* v. *Dudley Marshall (Properties) Ltd* [1957] Ch 317, *Western Bank Ltd* v. *Schindler* [1976] 3 WLR 341, CA, and *Ropaigealach* v. *Barclays Bank plc* [1993] 3 WLR 17, CA), it is doubtful whether this principle would ever now be applied to allow a mortgagee to take possession in bad faith, or in circumstances where possession could not possibly be required for the protection or enforcement of the security. When a mortgagee applied to the court for possession in such circumstances in *Albany Home Loans Ltd* v. *Massey* [1997] 2 All ER 609 (extracted at www.cambridge.org/propertylaw/), it was refused, and the general statement of the scope of a mortgagee's rights and duties made by Nicholls LJ in *Palk* v. *Mortgages Services Funding plc* [1993] 2 WLR 415 (extracted at www.cambridge.org/propertylaw/) provides ample support for the decision. It is also worth noting that the Council of Mortgage Lenders, in its 1997 Statement of Practice, 'Handling of Arrears and Possessions' (Extract 18.3 below) confirmed that possession will be taken only as a last resort (paragraphs 13 and 16) and never in the circumstances given in paragraph 16.

In practice, of course, there is no reason why a mortgagee acting in good faith would want to take possession except for the purposes of protecting or enforcing the security. An institutional lender is unlikely to want to take possession for its own purposes, and fear of adverse publicity would probably deter it even if it did, at least if it was a lender operating in the competitive house-purchase home-loan sector.

There are also potential legal problems. If the premises are residential, there is a danger of committing a criminal offence under section 6 of the Criminal Law Act 1967 if the mortgagee takes possession of occupied premises without a court order (section 6 makes it an offence to use or threaten force to secure entry to residential premises if at the time there is someone present on the premises who objects to the entry and the entrant knows this). And, if the mortgagee decides to apply for a court order of possession, the court has jurisdiction to refuse it under section 36 of the Administration of Justice Act 1970 as amended if the premises are or include a dwelling-house: see *Western Bank Ltd* v. *Schindler* [1976] 3 WLR 341 and *Ropaigealach* v. *Barclays Bank plc* [1999] 3 WLR 17, CA, for the scope of the jurisdiction.

Also, no mortgagee would want to spend any appreciable time in possession because of the risk of incurring liabilities to the mortgagor. Mortgagees in possession are liable to keep the property in repair (see *Downsview Nominees Ltd* v. *First City Corp. Ltd* [1993] 2 WLR 86, PC) and also come under a duty to account to the mortgagor not only for any income or profits actually received from the property while in possession but also for whatever it could, but for its wilful default, have received. The classic authority on this duty to account is *White* v. *City of London Brewery Co.* (1889) LR 42 ChD 237, CA, although it has to be said that there is no modern authority on precisely what this would now involve. Also, if the premises are in active use as business premises and the business is viable, it might be difficult to avoid coming under a duty to carry on, or at least not sabotage, the business (see *AIB Finance Ltd* v. *Debtors* [1998] 2 All ER 929, where there was held to be no duty where the business had already collapsed by the time the mortgagee took possession). And, once a mortgagee does start to get involved in the management of the business, it then appears to come under a duty to do so 'with due diligence' (see *Medforth* v. *Blake* [1999] 3 All ER 97, CA, where a receiver was held to be in breach of duty to the mortgagor by failing to obtain a discount on pig feed; there seems no reason why the same should not apply to a mortgagee in possession).

18.4.3. Sale

The reality is that, when a mortgagee does take possession, or applies to the court for a possession order, almost invariably it does so in order to obtain vacant possession with a view to selling the property under its power of sale.

18.4.3.1. When the power arises

The mortgagee's statutory power of sale is conferred by section 101(1)(i) of the Law of Property Act 1925, and arises 'when the mortgage money has become due'

(in other words, when any capital repayment is overdue). The statutory provision gives the mortgagee power to sell a greater interest than he himself has, i.e. the mortgagor's interest free from the mortgage and from any interest over which the mortgage takes priority. Consequently, any purported sale made by the mortgagee *before* the power has arisen will be ineffective because of the *nemo dat* rule: all that the purchaser can acquire is the mortgagee's own interest because that is all that the mortgagee has the capacity to convey.

18.4.3.2. When the power becomes exercisable

Section 103 of the 1925 Act prohibits exercise of the power of sale unless and until one of the three conditions specified there has been satisfied. These are that there has been a default in payment of some part of the capital for three months after the mortgagee served notice demanding repayment, or that interest payable under the mortgage is two months in arrears, or that there has been a breach of some other provision in the mortgage. However, these restrictions are more apparent than real: even the most minor breach will suffice for the third condition to be satisfied, and in any event the terms of section 103 may be varied by express provision in the mortgage deed.

Even if the power of sale has not yet become exercisable, the sale will be effective to transfer title to the purchaser because, once the power has *arisen*, the mortgagee does have the capacity to transfer title. Section 104 also provides that a sale cannot be set aside on the ground that the power has not yet become exercisable, and that a purchaser need not concern itself to see whether it has or not. However, it has been held that section 103 cannot protect a purchaser buying with notice of any impropriety or irregularity in the sale (see *Lord Waring* v. *London and Manchester Assurance Co. Ltd* [1935] Ch 310 and the earlier cases considered there).

18.4.4. Duties on enforcement

Up until the 1990s, the mortgagee's duty of care owed to the mortgagor in enforcing the security was formulated in negligence terms, i.e. a duty to take reasonable care in exercising its remedies. The classic statement of this appeared in *Cuckmere Brick* v. *Mutual Finance Ltd* [1971] Ch 949, where it was held that a mortgagee exercising the power of sale was under a duty to take reasonable care to obtain the market price for the property. One advantage of couching the duty in terms of negligence was that it made it clear that the duty was owed not only to the mortgagor but also, and to the same standard of care, to anyone reasonably foreseeably affected by the sale (for example, anyone holding a mortgage and charge taking priority after the mortgage, or a guarantor), and that a receiver appointed by a mortgagee owed the same duties as a mortgagee when enforcing the security.

However, in a series of cases culminating in the Privy Council decision in *Downsview Nominees Ltd* v. *First City Corp. Ltd* [1993] 2 WLR 86, PC, it was held that negligence is not an appropriate standard. The appropriate test, Lord Templeman said, is first, that in exercising its power of sale the mortgagee is under

a duty to take reasonable care to obtain the market price (i.e. confirming the substance of the test in *Cuckmere Brick*), but, secondly, that, in exercising all its other rights, powers and remedies under the mortgage, the mortgagee's duty is only to act in good faith and 'for the sole purpose of securing repayments of the moneys owing under his mortgage'. For a consideration of what this might amount to in practice, see *Palk* v. *Mortgage Services Funding plc* [1993] 2 WLR 415 (extracted at www.cambridge.org/propertylaw/), where Sir Donald Nicholls VC argued that in addition a mortgagee has a duty to act fairly towards the mortgagor (a proposition that does not appear inconsistent with anything Lord Templeman says in *Downsview*). This is particularly striking when viewed in the context of the *Palk* case itself, where the court ordered a sale of the mortgaged property against the wishes of the mortgagee despite the fact that this would not raise anything like enough to repay all the indebtedness, because, although the mortgagee had sound commercial reasons for refusing to agree to a sale, the consequences of not selling would be disproportionately harsh on the borrower.

Finally, it is instructive to compare the standards of behaviour on enforcement expected by the courts with those the lending industry itself regards as good practice. In so far as these relate to residential mortgages, they were set out in the Council of Mortgage Lenders' Statement of Practice on the Handing of Arrears and Possessions (1997), extracted below. This Statement of Practice was withdrawn by the CML in October 2004, when residential mortgage lenders ceased to be self-regulated and instead became subject to regulation by the Financial Services Authority (see the Mortgage Conduct of Business Rules published by the Financial Services Authority and available on their website, www.fsa.gov.uk). The 1997 CML Statement of Practice can nevertheless still tell us something interesting about how reputable lenders consider they ought to behave.

Extract 18.3 Council of Mortgage Lenders, *Statement of Practice: Handling of Arrears and Possessions* (1997)

INTRODUCTION

1. This Statement provides an overview of how mortgage lenders currently deal with mortgage arrears and possession cases. The facts of each arrears and possession case are unique, and each case needs to be treated individually. Mortgage lenders adopt flexible procedures for the handling of arrears and possession cases which are aimed at assisting the borrower as far as possible in his or her particular circumstances. Individual practice will, of course, vary between lenders depending, in particular, on whether they operate on a centralised or decentralised basis. This Statement describes how lenders deal with mortgage arrears; the procedures adopted when handling possession cases; the subsequent sale of property in possession and finally the recovery of any outstanding debt. Individual circumstances might arise in which action outside those referred to in this Statement may need to be taken.

MORTGAGE ARREARS

General principles

2. The following general principles are relevant to the question of mortgage arrears:

(a) When a borrower falls into arrears, the problem should be handled sympathetically and positively by the lender. The lender's first step will be to try to contact the borrower to discuss the matter.
(b) As soon as financial difficulties arise, the borrower should let the lender know as soon as possible.
(c) Once contact has been established, a plan for dealing with the borrower's financial difficulties and clearing the arrears will be developed consistent with the interests of both the borrower and the lender.
(d) Possession of the property will be sought only as a last resort when attempts to reach alternative arrangements with borrowers have been unsuccessful. The borrower will remain liable for the full mortgage debt.

The handling of arrears: initial action taken by lenders

3. Mortgage lenders or their agents may use the following administrative procedures for dealing with arrears:

(a) The lender's first step will be to try to contact the borrower, for example, by letter or telephone.
(b) The lender may seek a meeting with the borrower to discuss the situation and examine ways to resolve the problems. Alternatively, this may be done via the telephone or letter.
(c) Once contact has been established, a plan for clearing the arrears will be developed consistent with the interests of both the borrower and the lender.
(d) If contact cannot be made with the borrower and payments continue to be missed, legal action to recover the arrears or take possession of the property may be necessary.

Alleviating arrears problems

4. Lenders have the following measures which they can use to help some borrowers in arrears difficulties:

(a) *Extend the term of the mortgage*. In the case of a repayment loan the term of the loan can be lengthened, although in most cases this does not make a significant difference to the monthly repayments.
(b) *Change the type of mortgage*. An investment backed mortgage may be changed to a repayment, or interest only, mortgage with a subsequent reduction in monthly outgoings. The borrower should also take appropriate professional advice.
(c) *Defer payment*. Payment of part of the interest may be deferred for a period. This may be particularly appropriate where there is a temporary shortfall of income (for example, because of an industrial dispute or a temporary illness), or where there has been a rapid increase in interest rates. Lenders may in certain circumstances be willing to accept, for a reasonable period of time, the most the borrower could reasonably afford if this is in

the best interests of both the lender and the borrower. However, this is not a solution where, because of a permanent reduction in income, a borrower is unable to afford anywhere near the full mortgage repayments and there is little prospect of an improvement in the situation in the foreseeable future.

(d) *Capitalise interest*. Linked to (c) is the possibility of capitalising interest. This may be appropriate where arrears have built up but full monthly repayments can be resumed. The amount outstanding (capital sum and arrears of interest) may be rescheduled and repaid over the life of the loan. This might have an impact on the interest rate levied, whether a repayment vehicle will repay the loan in the case of an investment backed mortgage and eligibility for mortgage interest relief at source (MIRAS). Such an approach is unlikely to be adopted where the borrower has in the past failed to adhere to an alternative payment arrangement.

5. When agreeing alternative repayment arrangements, lenders will carry out an appraisal of a borrower's ability to meet the repayments. In some cases, the arrangements might be made for a specific period of time, after which an assessment is made as to whether the circumstances have changed to the extent that the arrangement can be varied.

6. In addition, lenders try to ensure that the borrower is aware of the availability of social security benefits which might apply such as income support to meet part of the mortgage interest repayments where a borrower is unemployed. Where the borrower has a multiple debt problem, the lender might suggest that the borrower contact a Citizens Advice Bureau or debt advice agency. At the borrower's request and with the borrower's consent, the lender will liaise wherever possible with a debt counselling organisation, for example, Citizens Advice Bureaux, money advice centres or the Consumer Credit Counselling Service.

7. In the vast majority of cases these approaches, together with the efforts of the borrower, are sufficient to prevent a minor arrears problem from becoming a major problem leading to possession. It is significant that, while many people fall into arrears for a short time, a much smaller proportion have large arrears and a very small proportion result in possession.

8. Where mortgage arrears have accrued on an account, lenders recognise the need for the account to be closely administered by staff with relevant expertise in dealing with borrowers experiencing repayment difficulties. Details of the mortgage account may be transferred to the lender's specialised mortgage arrears department, where the staff would liaise directly with the borrower. Alternatively, the account may be administered by the local branch, with overall monitoring by the lender's central arrears department. The borrower would be contacted to establish why the mortgage repayments were no longer being made, whether the borrower's circumstances had changed, for example, if the borrower was no longer employed, and if an alternative payment arrangement could be agreed. A record of the mortgage arrears may be held by a credit reference agency.

The levying of charges on accounts in arrear

9. In recent years, lenders have developed effective administrative and forbearance procedures to deal with cases where the borrower is unable to meet the mortgage

repayments in full. A great deal of time and resources has been devoted to ensuring that these procedures operate to assist defaulting borrowers remain in their homes. Taking into account the additional costs which might be incurred in administering accounts in arrear, lenders may levy a fee on the borrower's account to meet a proportion of these costs.

10. However, lenders also recognise the difficulties facing borrowers who are experiencing problems in meeting their mortgage repayments. If a fee is levied on an account, it usually represents the reasonable cost of the additional administration required. When fees are charged, these may be on either a monthly or quarterly basis. Alternatively, lenders may charge only where certain administrative procedures have been carried out, for example, a home visit by a money adviser (employed by the lender) or where legal proceedings have been initiated.

11. In practice, lenders advise borrowers of any fees which might be charged either prior to the fee being levied or, when the fee is in respect of services, prior to the services being provided. Lenders may also advise borrowers when they take out a mortgage that fees may be charged to the account if it falls into arrear. Information on any fees is usually incorporated in mortgage documentation or published tariffs.

12. In many cases, where borrowers are experiencing difficulties in meeting their mortgage repayments, an alternative payment arrangement may be reached between the lender and the borrower. If an alternative payment has been agreed, and is being adhered to by the borrower, lenders may either cease levying a fee on the account or continue to charge fees until the account has been brought up to date.

POSSESSION

Methods of obtaining possession

13. Possession of a property will be sought only as a last resort when all attempts to reach alternative arrangements with the borrower have been unsuccessful. A lender may obtain possession of a property in three ways:

(a) *By court order*. When pursuing possession proceedings through the courts, lenders must adhere to all the legal requirements and procedures to enforce their security, a number of which give considerable protection to the borrower. Proceedings may be suspended should the court consider that a borrower may be able, within a reasonable time period, to pay any sums due under the mortgage. The execution of the possession order may be postponed for a time to allow the borrower to secure alternative accommodation.

(b) *By voluntary agreement with the lender*. A borrower who has fallen into arrears and who has little prospect of repaying such arrears may reach an agreement with his lender to hand over the property to the lender without the need to obtain a court order. A borrower may also be asked to sign a voluntary possession declaration to confirm the agreement, which would make it clear that mortgage interest together with other charges will continue to accrue until the property is sold. A voluntary surrender may result in an earlier sale of the property than would be the case with court proceedings.

(c) *Surrender (or abandonment) by the borrower without notifying the lender*. In cases where a borrower has failed to discuss his mortgage arrears problems with the lender,

or where suitable arrangements have not been reached between the lender and borrower, a borrower may simply vacate the property without advising the lender; often keys are sent to the lender, this being possibly the first intimation that the property has been surrendered. In such circumstances, the property would be sold by the lender. Again, the borrower is liable for the total debt including mortgage interest which accrues until the property is sold.

Irrespective of how the property is taken into possession, the borrower will remain liable for the outstanding debt including any accrued interest and charges between the date of possession and the date of sale.

In some cases, borrowers who have had their properties taken into possession may seek a mortgage on another property. Potential borrowers should not conceal the fact that they have defaulted on a previous loan. The subsequent lender will be aware of the previous mortgage either as a result of enquiries of the original lender or the CML Mortgage Possessions Register which lists borrowers who have had their properties taken into possession.

Administrative aspects

15. While lenders operate different administrative procedures to deal with possession cases, the following procedures are common:

(a) Should direct contact with the borrower not result in an arrangement (for example, an alternative payment arrangement) which would enable the borrower to remain in the property, then solicitors may be instructed to start possession proceedings. This is usually the only course of action available to the lender by that time.
(b) In some cases, further follow-up contact may continue to be made up until, and after, the court hearing, every effort being made to encourage the customer to discuss suitable repayment arrangements and avoid the need for possession.
(c) Instructions for a warrant to be issued for possession are implemented by the lender, after a full review of the borrower's file by a person fully aware of the facts, and a final letter or telephone call to the borrower.
(d) Before taking possession, a lender may liaise with the relevant local housing department. The borrower may also be advised to register on the local authority's list as soon as possible. Lenders recognise that it is important to give local authority housing departments as much notice as possible where borrowers and their families might need to be rehoused. However, this has to be balanced against the possibility that alternative arrangements might be reached between the lender and borrower which would enable the borrower to remain in the property. The timing of providing advice to housing departments will vary from case to case and lenders will only take this course of action with the consent of the borrower.
(e) On taking possession, the Court Officer may be accompanied by the lender's representative, after which the property will usually be put on the market as soon as possible to minimise the mortgage interest continuing to accrue on the account. A record of the possession may be held on the CML Possessions Register.

CML/GOVERNMENT STATEMENT ON ARREARS AND POSSESSION PROCEDURES

16. In December 1991, after detailed discussions with the government, the CML reaffirmed that it is the policy of lenders to take possession only as a last resort, and to handle arrears problems efficiently and sympathetically. A formal announcement was made by the Chancellor of the Exchequer in the House of Commons and at a CML Press Conference on 19 December 1991. The announcement referred to the fact that:

(a) Where borrowers have suffered a significant reduction in their income but are making a reasonable regular payment, lenders do not seek to take possession.
(b) In the knowledge that income support will in future be paid direct, lenders will not take possession in cases where mortgage interest payments are covered by income support.

17. From October 1995, income support has been paid by the Department of Social Security at a 'standard rate' of interest, which may be less than the interest rate charged by the lender. Borrowers will need to make up any shortfall in the mortgage repayment. Some lenders have decided not to participate in the direct payment scheme. In these cases, the borrower will be responsible for passing on the income support for mortgage interest payment to their lender.

SALE OF PROPERTIES IN POSSESSION

18. When selling properties which have been taken into possession lenders are under a duty to obtain the best price reasonably obtainable. A lender is not bound to postpone the sale in the hope of obtaining a better price at some future date; however, the lender should allow sufficient time to permit, for example, proper advertising so that the best price obtainable may be achieved. Mortgage lenders generally use the following administrative procedures for selling properties which have been taken into possession:

(a) *Administration*. The sale may be dealt with either via a lender's in-house department or through a separate property management company employed by the mortgage lender. Dedicated staff are responsible for co-ordinating the sale of properties in possession which will include reviewing the offers received from potential purchasers as well as monitoring the condition of these properties and their valuation.
(b) *Valuation*. A valuation of the property is obtained from either one or two qualified surveyors and another from the appointed estate agent. Prices are usually reviewed every three to four months and more often when the circumstances justify a revaluation.
(c) *Estate agents*. Properties are usually marketed through an estate agent in the immediate locality of the property being sold. Agents may advertise properties in the local press, with such advertisements being repeated as and when necessary. Mailshots and national advertising may also be carried out in some cases. In general, lenders do not market these properties as 'repossessed properties'; in many cases estate agents are specifically instructed not to do so.
(d) *Report on activity*. Estate agents are usually required to report on activity every four to six weeks if a property remains unsold. The estate agent will notify a mortgage lender

of any offers received. Only when satisfied that the best price has been obtained, would the estate agent recommend this offer for acceptance. If the offer is substantially below the asking price, the agent must provide supporting evidence to suggest that this would be the best offer obtained. In practice, all offers are accepted or declined promptly. Where there are a number of very close offers on a property, a sealed bid procedure may be carried out whereby the person putting forward the best offer would be the successful purchaser.

(e) *Visits to the property*. The agent will usually visit the property on a regular basis and ensure that any repairs and maintenance to the property are carried out and that the property is secure. When properties are first put up for sale, mortgage lenders will usually arrange that essential repairs, cleaning and tidying of the garden are carried out. While the estate agent will take care of minor repairs which are identified on the regular visits, other repairs usually require the approval of the mortgage lender. Where this work is carried out, estate agents will be required to obtain competitive estimates. Prospective purchasers will normally be accompanied by the agent when viewing a property.

(f) *Auction*. Properties in possession may be sold via auction. These properties are reviewed relative to sales experience and the length of time on the market. There are occasions when properties may be sold by auction because either the auction is specifically targeted at the type of property in question, e.g. a period type of residence, or the property will generally appeal to the speculator market because of its condition. Such properties are referred to an appropriate auctioneer. A catalogue would be issued and the properties are available for viewing. A reserve price is usually based on information relating to the number of viewings and general level of interest. A reserve price is set several days before the auction following consultation with a surveyor on the valuation of the property.

Proceeds of sale

19. Following the sale of a property in possession, the proceeds of sale will be applied in the following way. First, the lender will use the funds to meet the costs incurred in selling the property and to repay the outstanding mortgage including interest. If there are subsequent loans secured against the property any surplus will also be applied to repay these loans prior to any amounts being paid to the borrower. If there are insufficient proceeds of sale to repay the mortgage, the borrower will remain liable to repay any outstanding debt.

Indemnity insurance

20. Mortgage indemnity is insurance which a lender may take out for its protection where a high percentage loan is made. This insurance policy covers the situation in which, at some future stage, the lender has to repossess the property and sell it and the lender suffers a loss. For example, if the property is sold for less than the amount of the borrower's outstanding mortgage (including accrued interest) the lender can claim on the mortgage indemnity to recover some of its loss. The basic security for the mortgage is the property. The mortgage indemnity, therefore, acts as a form of additional

security for the lender. It provides no protection to the borrower who gains no benefit, other than a high percentage loan advance than would otherwise have been granted.

21. In most cases, the mortgage indemnity will cover the lender only for part of its loss and, in addition, once an insurer has paid a mortgage indemnity claim, it gains the right of subrogation; this means that the insurer can reclaim from the borrower any money it has paid to the lender under the mortgage indemnity claim. Either the lender or its insurer may take legal action against the borrower to recover the shortfall if the borrower does not repay it voluntarily, although any action is taken in the name of the lender. In most cases, the lender contacts the borrower to recover the shortfall on behalf of itself and its insurer. This does not mean that the lender recovers the loss twice; any money paid by the insurer which is collected from the borrower is then passed back to the insurer.

Loss recovery procedures

22. Following the sale of a property, the borrower remains liable to repay any shortfall which might arise between the amount of the outstanding mortgage and the sale price obtained. When a borrower purchases a property with mortgage finance, the borrower enters into a personal covenant with the lender to repay the mortgage in full. When two or more borrowers purchase a property, the lender will treat them as jointly and severally liable for the entire amount borrowed, irrespective of how much each borrower actually contributed to the mortgage repayments on a monthly basis. The lender has 12 years (5 years in Scotland) in which to seek recovery of the shortfall via the courts. Direct recovery could extend beyond that point.

23. After the sale of a property, the borrower should keep their lender advised of forwarding addresses so that contact can made regarding the sale and repayment of any shortfall. The lender will notify the borrower either by letter or by telephone as soon as practicably possible of the amount of the shortfall. If the borrower has not provided a forwarding address, the lender will try to locate and make contact with the former borrower.

24. The lender and the borrower will generally agree a repayment arrangement taking into account the borrower's current income and expenditure. In the majority of cases, payment arrangements are made without the need for court proceedings; this enables both parties to review the arrangement as and when necessary should circumstances change. If the borrower is unwilling to enter into an acceptable voluntary arrangement, the lender may use other enforcement remedies via the courts to seek repayment. A record of the repayment arrangement might be held by a credit reference agency and the borrower will need to advise any future lender of the shortfall debt and repayment arrangement.

Notes and Questions 18.3

Read the above extract and also *Albany Home Loans Ltd* v. *Massey* [1997] 2 All ER 609, CA, *Downsview Nominees Ltd* v. *First City Corp. Ltd* [1993] AC 295; [1993] 2 WLR 86; [1993] 3 All ER 626, PC, and *Palk* v. *Mortgage Services Funding plc* [1993]

Ch 330; [1993] 2 WLR 415; [1993] 2 All ER 481, CA, either in full or as extracted at www.cambridge.org/propertylaw/. In the light of all these, consider the following:

1 Consider how far *Albany Home Loans Ltd* v. *Massey* is consistent with (a) *Four-Maids Ltd* v. *Dudley Marshall (Properties) Ltd* [1957] Ch 317, *Western Bank Ltd* v. *Schindler* [1976] 3 WLR 341, CA, and *Ropaigealach* v. *Barclays Bank plc* [1993] 3 WLR 17, CA, (b) the statements of principles established in *Downsview* and *Palk*, and (c) paragraphs 13 and 16 of the CML Statement of Practice.

2 Explain why a second mortgagee is entitled to buy up the first mortgage, by paying off everything due to the first mortgagee. Why would it want to do so?

3 Why does a first mortgagee and its receiver owe the same duty to the second mortgagee as it owes to the mortgagor?

4 According to the Privy Council in *Downsview*, what duties does a mortgagee owe to the mortgagor and others (a) when exercising the power of sale, and (b) when exercising any of its other rights and remedies under the mortgage? Why should there be two different levels of liability?

5 Can a mortgagee sell at whatever time it wants – for example, would it be in breach of duty if it sold within a few days of making the decision to sell, or sold at an auction held in the dead of night in the middle of the country without telling anyone? See *Predeth* v. *Castle Philips Finance Co. Ltd* [1986] 2 EGLR 144; (1986) 279 EG 1355, *American Express* v. *Hurley* [1985] 3 All ER 568, *Standard Chartered Bank Ltd* v. *Walker* [1982] 1 WLR 1410; [1982] 3 All ER 938, and *Palk* v. *Mortgage Services Funding plc* [1993] Ch 330; [1993] 2 WLR 415; [1993] 2 All ER 481.

6 If a receiver appointed by a mortgagee of freehold land subject to a lease negligently fails to exercise an option in the lease to increase the rent payable under the lease, would the receiver be in breach of duty? See *Knight* v. *Lawrence* [1991] BCC 411; [1993] BCLC 215; [1991] 01 EG 105, but note this case was decided before *Downsview*: would it have been decided differently if heard after *Downsview*? See *Medforth* v. *Blake*, noted in section 18.4.2 above.

7 It is said in *Downsview* that, if a mortgagee (or receiver) takes possession of business premises, it is not obliged to carry on the business of the mortgagee. How realistic is this: will it be in breach of its duty to take reasonable care to obtain the market value of business premises if it destroys any goodwill attaching to the premises by allowing a thriving business to collapse? See *AIB Finance* v. *Debtors*, particularly the judgment at first instance ([1997] 4 All ER 677), but also the opposite view on the point expressed *obiter* in the Court of Appeal ([1998] 2 All ER 929).

8 To what extent is the analysis of Nicholls VC in *Palk* inconsistent with what Lord Templeman says in *Downsview*? Are these differences in substance or just different ways of expressing the same thing?

9 The *dictum* of Lord Denning in *Quennell* v. *Maltby* was quoted in *Albany Home Loans Ltd* v. *Massey* as support for the court's decision in *Massey* not to grant a possession order against Mr Massey. Lord Denning said:

> A mortgagee will be restrained from getting possession except when it is sought bona fide and reasonably for the purpose of enforcing the security and then only subject to such conditions as the court thinks fit to impose.

In the light of the other cases discussed here, is this an accurate statement of the present law? If not, should it be adopted as a general principle of mortgage law?

Bibliography

Ackerman, Bruce, *Private Property and the Constitution* (New Haven and London: Yale University Press, 1977)

Alexander, Gregory S., *Commodity and Propriety: Competing Visions of Property in American Legal Thought 1776–1970* (Chicago: University of Chicago Press, 1997)

Anderson, Terry L., and Hill, P. J., 'The Evolution of Property Rights', in T. L. Anderson and F. S. McChesney (eds.), *Property Rights: Co-operation, Conflict, and Law* (Princeton: Princeton University Press, 2003), p. 135

Anderson, Terry L., and McChesney, Fred S., *Property Rights: Co-operation, Conflict, and Law* (Princeton: Princeton University Press, 2003)

Ausness, R., 'Water Rights, the Public Trust Doctrine and the Protection of Instream Uses' (1986) *University of Illinois Law Review* 407–37

Ballantine, H. W., 'Title by Adverse Possession' (1918) 32 *Harvard Law Review* 135

Barnsley, D. G., 'Co-owners' Rights to Occupy Trust Property' (1998) *Cambridge Law Journal* 123

Bartlett, Richard, 'Humpies Not Houses, or the Denial of Native Title: A Comparative Assessment of Australia's Museum Mentality' (2003) 10 *Australian Property Law Journal* 12

Barzel, Yoram, 'Optimal Timing of Innovations' (1968) 50 *Review of Economics and Statistics* 348

Economic Analysis of Property Rights (2nd edn, Cambridge: Cambridge University Press, 1997)

Battersby, G., and Preston, A. D., 'The Concepts of "Property", "Title" and "Owner" Used in the Sale of Goods Act 1893' (1972) 35 *Modern Law Review* 268

Beaglehole, Earnest, *Property: A Study in Social Psychology* (London: Allen & Unwin, 1931)

Becker, Lawrence C., *Property Rights: Philosophic Foundations* (London: Routledge and Kegan Paul, 1977)

'The Moral Basis of Property Rights', in J. Roland Pennock and John Chapman (eds.), *Nomos XXII: Property* (New York: New York University Press, 1980), Chapter 8

Bell, A. P., *Modern Law of Personal Property in England and Ireland* (London: Butterworths, 1989)

Bentham, Jeremy, *The Theory of Legislation, Principles of the Civil Code* (ed. C. K. Ogden, London: Kegan Paul & Co., 1931)

Berg, Alan, 'Clogs on the Equity of Redemption – Or Chaining the Unruly Dog' (2002) *Journal of Business Law* 335

Berle, Adolf A., and Means, Gardiner C., *The Modern Corporation and Private Property* (New York: Harcourt, Brace & World, 1932)

Birks, Peter, 'Five Keys to Land Law', in S. Bright and J. Dewar (eds.), *Land Law: Themes and Perspectives* (Oxford: Oxford University Press, 1998), Chapter 18

Blackstone, Sir William, *Commentaries on the Laws of England* (Chicago and London: Chicago University Press, 1979)

Brennan, Frank, *The Wik Debate: Its Impact on Aborigines, Pastoralists and Miners* (Sydney: New South Wales University Press, 1998)

Buckle, Stephen, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford: Clarendon Press, 1991)

Buckley, F. H., 'The Bankruptcy Priority Puzzle' (1986) 72 *Virginia Law Review* 1393

Burn, E. H., *Cheshire and Burn's Modern Law of Real Property* (16th edn, London: Butterworths, 2000)

Byrne-Sutton, Quentin, 'The Goldberg Case: A Confirmation of the Difficulty in Acquiring Good Title to Valuable Stolen Cultural Objects' (1992) 1 *International Journal of Cultural Property* 151

Calabresi, Guido, and Melamed, A. Douglas, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089

Carsberg, B. V., Page, M. J., Sindall, A. J., and Waring, L. D., *Small Company Financial Reporting* (Englewood Cliffs, NJ: Prentice Hall, 1986)

Chakravaty-Kaul, Minoti, *Common Lands and Customary Law: Institutional Change in North India Over The Past Two Centuries* (Oxford: Oxford University Press, 1996)

Cheffins, Brian, *Company Law: Theory, Structure and Operation* (Oxford: Clarendon Press, 1997)

Clarke, Alison, 'Property Law' (1996) 49 *Current Legal Problems* 97

'Ship Mortgages', in N. Palmer and E. McKendrick (eds.), *Interests in Goods* (2nd edn, London, Lloyd's of London Press, 1998)

'Use, Time and Entitlement' (2004) 57 *Current Legal Problems* 239

Coase, R. H., 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1

Cohen, Felix S., 'Dialogue on Private Property' (1954) 9 *Rutgers Law Journal* 357

Coleman Jules L., and Kraus, Jody, 'Rethinking the Theory of Legal Rights' (1986) 95 *Yale Law Journal* 1335

Conveyancing and Land Law Committee of the Law Society, *Undue Influence – Solicitors' Duties Post-'Etridge'* (Guidance Note, May 2002)

Cooter, Robert D., 'Time, Property Rights, and the Common Law' (1986) 64 *Washington University Law Quarterly* 804

Cooter, Robert D., and Ulen, Thomas, *Law and Economics* (4th edn, Boston: Addison Wesley Longman, 2004)

Cotterrell, R., 'Some Sociological Aspects of the Controversy Around the Legal Validity of Private Purpose Trusts', in S. Goldstein (ed.), *Equity and Contemporary Legal Developments* (Jerusalem: H &M Sacher Institute, 1992)

Council of Mortgage Lenders, Handling of Arrears and Possessions (Statement of Practice, 1997)

Critchley, Patricia, 'Taking Formalities Seriously', in S. Bright and J. K. Dewar (eds.), *Land Law: Themes and Perspectives* (Oxford: Oxford University Press, 1998), Chapter 20

Cunningham, R. A., 'More on Adverse Possession: A Rejoinder to Professor Helmholz' (1986) 64 *Washington University Law Quarterly* 1167

Cunningham, R. A., Stoebuck, W. B., and Whitman, D. A., *The Law of Property* (3rd edn, St Paul, MN: West Group, 2000)

Dahlman, Carl, *The Open Field System and Beyond* (Cambridge: Cambridge University Press, 1980)

Dales, J. H., *Pollution Property and Prices: An Essay in Policy-Making and Economics* (Toronto: University of Toronto Press, 1968)

Dasgupta, P., and Stiglitz, J., 'Uncertainty, Industrial Structure, and the Speed of R&D' (1980) 11 *Bell. Journal of Economics* 1

De Alessi, Louis, 'Gains from Private Property', in T. L. Anderson and F. S. McChesney (eds.), *Property Rights: Co-operation, Conflict, and Law* (Princeton: Princeton University Press, 2003), Chapter 4

De Lacy, J., 'The Priority Rule of Dearle v. Hall Re-stated' (1999) *Conveyancer* 311

Deakin, S., Johnston, A., and Markesinis, B. S. (eds.), *Markesinis and Deakin's Tort Law* (5th edn, Oxford: Clarendon Press, 2003)

Demsetz, Harold, 'Towards a Theory of Property Rights' (1967) 57 *American Economic Review* 347

'Ownership and the Externalities Problem', in T. L. Anderson and F. S. McChesney (eds.), *Property Rights: Co-operation, Conflict, and Law* (Princeton: Princeton University Press, 2003), Chapter 11

Department of the Environment, Transport and the Regions, *Good Practice Guide on Managing the Use of Common Land* (London: Department of the Environment, Transport and the Regions, June 1998)

Dharmapala, Dhammika, and Pitchford, Rohan, 'An Economic Analysis of "Riding to Hounds": Pierson v. Post Revisited' (2002) 18 *Journal of Law, Economics, and Organization* 39

Diamond, A. L., *A Review of Security Interests in Property* (London: HMSO, 1989)

Director-General of Fair Trading, *Guidelines for Lenders on Non-Status Lending* (London: Office of Fair Trading, 1997)

Dixon, Martin, 'Overreaching and the Trusts of Land and Appointment of Trustees Act 1996' (2000) *Conveyancer* 267

'The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment' (2003) *Conveyancer* 16

Dockray, Martin, 'Why Do We Need Adverse Possession?' (1985) *Conveyancer* 272

Dromgoole, Sarah, and Gaskell, Nicholas, 'Interests in Wrecks', in N. Palmer and E. McKendrick (eds.), *Interests in Goods* (2nd edn, London: Lloyd's of London Press, 1998) Chapter 7

Dunne, Paul, and Hughes, Alan, 'Age, Size, Growth and Survival: UK Companies in the 1980s' (1994) 42 *Journal of Industrial Economics* 115

Easterbrook F., and Fischel, D., *The Economic Structure of Corporate Law* (Cambridge, MA: Harvard University Press, 1991)

Ellickson, Robert C., 'Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights' (1986) 64 *Washington University Law Quarterly* 723

'A Hypothesis of Wealth-Maximising Norms: Evidence from the Whaling Industry' (1989) 5 *Journal of Law, Economics, and Organization* 83

'Property in Land' (1993) 102 *Yale Law Journal* 1315

Epstein, Richard A., 'Notice and Freedom of Contract in the Law of Servitudes' (1982) 55 *Southern California Law Review* 1353

'Past and Future: The Temporal Dimension in the Law of Property' (1986) 64 *Washington University Law Quarterly* 667

Etheleriadis, P., 'The Analysis of Property Rights' (1996) 16 *Oxford Journal of Legal Studies* 31

Farrand J. T. (ed.), *Wolstenholme and Cherry's Conveyancing Statutes*, vol. 1 (13th edn, London: Oyez Publishing Ltd, 1972)

Farrand, J. T., and Clarke, Alison (eds.), *Emmet and Farrand on Title* (19th edn, looseleaf, London: Sweet & Maxwell)

Feather J., 'Authors, Publishers and Politicians: The History of Copyright and the Book Trade' (1988) 12 *European Intellectual Property Review* 377

Fennell, Lee Anne, 'Common Interest Tragedies' (2004) 98 *Northwestern University Law Review* 907

Ferris, Graham, and Battersby, Graham, 'Overreaching and the Trusts of Land and Appointment of Trustees Act 1996 – A Reply to Mr Dixon' (2001) *Conveyancer* 221

'The Impact of the Trusts of Land and Appointment of Trustees Act 1996 on Purchasers of Registered Land' (1998) *Conveyancer* 168

'The General Principles of Overreaching and the Reforms of 1925' (2002) 118 *Law Quarterly Review* 270

Filmer, Sir Robert, *Patriarcha and Other Writings* (ed. Johann P. Sommerville, Cambridge: Cambridge University Press, 1991)

Flathman, Richard E., 'Impossibility of an Unqualified Disjustificatory Theory', in J. Roland Pennock and John Chapman (eds.), *Nomos XXII: Property* (New York: New York University Press, 1980), Chapter 3

Fleming, J., *The Law of Torts* (8th edn, London: Sweet & Maxwell, 1992)

Fox, David, 'Bona Fide Purchase and the Currency of Money' (1996) *Cambridge Law Journal* 547

Fuller, Lon, 'Form and Consideration' (1941) 41 *Columbia Law Review* 799

Furey, Nigel, 'Goods Leasing and Insolvency', in N. Palmer and E. McKendrick (eds.), *Interests in Goods* (2nd edn, London: Lloyd's of London Press, 1998), p. 787

Gallie, W. B., 'Essentially Contested Concepts' (1955–6) 56 *Proceedings of the Aristotelian Society* 167

Gardner, Simon, 'New Angles on Unincorporated Associations' (1992) *Conveyancer* 41

Gearty C., 'The Place of Private Nuisance in a Modern Law of Torts' (1989) *Cambridge Law Journal* 214

Golinveaux, J., 'What's in a Domain Name: Is "Cybersquatting" Trademark Dilution?' (1999) 33 *University of San Francisco Law Review* 641

Goode, R. M., 'Is the Law Too Favourable to Secured Creditors?' (1983–4) 8 *Canadian Business Law Journal* 53

Proprietary Rights and Insolvency in Sales Transactions (2nd edn, London: Sweet & Maxwell and Centre for Commercial Law Studies, 1989)

Commercial Law (2nd edn, London: Penguin Books, 1995)

Goodman, M., 'Adverse Possession of Land – Morality and Motive' (1970) 33 *Modern Law Review* 281

Gray, J. C., *The Nature and Sources of the Law* (ed. D. Campbell and P. Thomas, Aldershot: Dartmouth, 1996)

Gray, K., 'Property in Thin Air' (1991) *Cambridge Law Journal* 252

Elements of Land Law (2nd edn, London: Butterworths, 1993)

'Equitable Property' (1995) 48 *Current Legal Problems* 157

Gray, K., and Gray, S. F., *Elements of Land Law* (3rd edn, London: Butterworths, 2001)

Elements of Land Law (4th edn, Oxford: Oxford University Press, 2005)

Grey, Thomas C., 'The Disintegration of Property', in J. Roland Pennock and John Chapman (eds.), *Nomos XXII: Property* (New York: New York University Press, 1980), Chapter 3

Grunebaum, James O., *Private Ownership* (London and New York: Routledge and Kegan Paul, 1987)

Hadden, Tom, *Company Law and Capitalism* (2nd edn, London: Weidenfeld & Nicolson, 1977)

Haddock, David, 'First Possession Versus Optimal Timing: Limiting the Dissipation of Economic Value' (1986) 64 *Washington University Law Quarterly* 775

Halstead, P., 'Human Property Rights' (2002) *Conveyancer* 513

Hanbury and Martin, *Modern Equity* (ed. J. E. Martin, 16th edn, London: Sweet & Maxwell, 2001)

Hardin, Garrett, 'The Tragedy of the Commons' (1968) 162 *Science* 1243

Hargreaves, A. D., 'Review of Modern Real Property' (1956) 19 *Modern Law Review* 14

Introduction to the Principles of Land Law (4th edn, London: Sweet & Maxwell, 1963)

Harpum, Charles, 'Overreaching, Trustees' Powers and the Reform of the 1925 Legislation' (1990) *Cambridge Law Journal* 277

Harris, J. W., 'Ownership of Land in English Law', in N. MacCormick and P. Birks (eds.), *The Legal Mind* (Oxford: Clarendon Press, 1986)

Hayton, D. J., *Commentary and Cases on the Law of Trusts and Equitable Remedies* (11th edn, London: Sweet & Maxwell, 2001)

Hayton, D. J., and Marshall, O. R., *Cases and Commentary on the Law of Trusts* (9th edn, London: Sweet & Maxwell, 1991)

Cases and Commentary on the Law of Trusts (10th edn, London: Sweet & Maxwell, 1996)

Hegel, G. W. F., *Philosophy of Right (1821)* (trans. with notes by T. M. Knox, Oxford: Oxford University Press, 1945)

Heller, Michael, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111 *Harvard Law Review* 621

Helmholz, R., 'Adverse Possession and Subjective Intent' (1983) 61 *Washington University Law Quarterly* 331

Hill, Jonathan, 'The Role of the Donee's Consent in the Law of Gift' (2001) 117 *Law Quarterly Review* 127

Hohfeld, Wesley Newcomb, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16

Holdsworth, Sir William, *A History of English Law* (3rd edn, London: Methuen and Co. Ltd, 1923)

Book Review (1933) 49 *Law Quarterly Review* 576

Honoré, A. M., 'Ownership', in A. M. Honoré, *Making Laws Bind* (Oxford: Clarendon Press, 1987)

Hudson, Anthony, 'Abandonment', in N. Palmer and E. McKendrick (eds.), *Interests in Goods* (2nd edn, London: Lloyd's of London Press, 1998), Chapter 23

Hume, David, *A Treatise of Human Nature* (ed. with notes by L. A. Selby-Bigge, Oxford: Clarendon Press, 1888)

International Federation of Surveyors, Statement on the Cadastre (International Federation of Surveyors, 1995)

Ireland, Paddy, 'Company Law and the Myth of Shareholder Ownership' (1999) 62 *Modern Law Review* 32

Jackson, T. H., and Kronman, A. T., 'Secured Financing and Priorities Among Creditors' (1979) 88 *Yale Law Journal* 1143

Kohler, Paul, 'The Whittling Away of Way' (1992) *Conveyancer* 354

'Kentucky Fried Chicken' (1993) 2 *International Journal of Cultural Property* 133–45

Kohler, P., and Palmer, N., 'Information as Property', in N. Palmer and E. McKendrick (eds.), *Interests in Goods* (2nd edn, London: Lloyd's of London Press, 1998)

Kramer, Matthew H., *John Locke and the Origins of Private Property: Philosophical Explorations of Individualism, Community, and Equality* (Cambridge: Cambridge University Press, 1997)

Land Registry, *Annual Report and Accounts 2002–2003*

Adverse Possession (Practice Guide No. 4, March 2003)

Defining the Service: E-conveyancing (July 2004)

Law Commission, *Interim Report on Distress for Rent* (Law Commission Report No. 5, 1966)

Transfer of Land: Appurtenant Rights (Law Commission Consultative Document No. 36, 1971)

Transfer of Land: Land Registration (Second Paper) (Law Commission Consultative Document No. 37, 1971)

Transfer of Land: The Law of Positive and Restrictive Covenants (Law Commission Report No. 127, 1984)

Codification of the Law of Landlord and Tenant: Forfeiture of Tenancies (Law Commission Report No. 142, 1985)

Distress for Rent (Law Commission Consultative Document No. 97, 1986)

Deeds and Escrows (Law Commission Report No. 163, 1987)

Third Report on Land Registration (Law Commission Report No. 158, 1987)

Landlord and Tenant Law: Privity of Contract and Estate (Law Commission Report No. 174, 1988)
Trusts of Land: Overreaching (Law Commission Consultative Document No. 106, 1988)
Transfer of Land: Overreaching: Beneficiaries in Occupation (Law Commission Report No. 188, 1989)
Transfer of Land: Trusts of Land (Law Commission Report No. 181, 1989)
Distress for Rent (Law Commission Report No. 194, 1991)
Transfer of Land: Land Mortgages (Law Commission Report No. 204, 1991)
Transfer of Land: Obsolete Restrictive Covenants (Law Commission Report No. 201, 1991)
Sale of Goods Forming Part of a Bulk (Law Commission Report No. 215, 1993)
Landlord and Tenant Law: Termination of Tenancies Bill (Law Commission Report No. 221, 1994)
Landlord and Tenant Law: Termination of Tenancies by Physical Re-entry: A Consultative Document (Law Commission Consultative Document, January 1998)
The Execution of Deeds and Documents by or on Behalf of Bodies Corporate (Law Commission Report No. 253, 1998)
The Rule Against Perpetuities and Excessive Accumulations (Law Commission Report No. 251, 1998)
Electronic Commerce: Formal Requirements in Commercial Transactions (Law Commission, December 2001)
Limitation of Actions (Law Commission Report No. 270, 2001)
Termination of Tenancies for Tenant Default (Law Commission Consultation Paper No. 174, 2004)

Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Consultative Document* (Law Commission Consultation Paper No. 252, 1998)
Land Registration for the Twenty-First Century: A Conveyancing Revolution (Law Commission Report No. 271, 2001)

Law Reform Committee, *The Acquisition of Easements and Profits by Prescription* (Law Reform Committee Fourteenth Report, Cmnd 3100, 1966)
Eighteenth Report on Conversion and Detinue (Cmnd 4774, 1971)

Law, John, 'Considerations sur le numeraire et le commerce', in E. Daire (ed.), *Economistes financiers du XVIIIe siecle* (Geneva: Slatkin Reprints, 1971)

Lawson, F. H., *The Rational Strength of English Law* (London: Stevens & Sons, 1951)
Remedies of English Law (2nd edn, London: Butterworths, 1980)

Lawson, F. H., and Rudden, B., *The Law of Property* (2nd edn, Oxford: Clarendon Press, 1982)
The Law of Property (3rd edn, Oxford: Clarendon Press, 2002)

Libecap, G. D., 'Contracting for Property Rights', in T. L. Anderson and F. S. McChesney (eds.), *Property Rights: Co-operation, Conflict, and Law* (Princeton: Princeton University Press, 2003), p. 150

Libling, David, 'The Concept of Property: Property in Intangibles' (1978) 94 *Law Quarterly Review* 103

Locke, John, 'On Property', in John Locke, *Second Treatise of Government* (1690)

Lokan, Andrew, 'From Recognition to Reconciliation: The Functions of Aboriginal Rights Law' (1999) 23 *Melbourne University Law Review* 65

Lucy, W. N. R., and Mitchell, C., 'Replacing Private Property: The Place for Stewardship' (1996) *Cambridge Law Journal* 566

Lueck, Dean, 'First Possession as the Basis of Property', in T. L. Anderson and F. S. McChesney (eds.), *Property Rights: Co-operation, Conflict, and Law* (Princeton: Princeton University Press, 2003), Chapter 8

Luther, Peter, 'William v. Hensman and the Uses of History' (1995) 15 *Legal Studies* 219

Macpherson, C. B., 'Capitalism and the Changing Concept of Property', in E. Kamenka and R. S. Neale (eds.), *Feudalism, Capitalism and Beyond* (London: Edward Arnold, 1975)

'Human Rights as Property Rights' (1977) 24 *Dissent* 72

Maitland, F. W., *Selected Essays* (ed. H. D. Hazeltine *et al.*, Cambridge: Cambridge University Press, 1936)

'The Beatitude of Seisin' (1888) 13 *Law Quarterly Review* 24

Manchester, A. H., *A Modern Legal History of England and Wales 1750–1950* (London: Butterworths, 1980)

Marx, Karl, and Engels, Frederick, *The Communist Manifesto* (ed. G. S. Jones, Penguin Classics, 1973)

Mason, J. K., and Laurie, G. T., 'Consent or Property? Dealing with the Body and Its Parts in the Shadow of Bristol and Alder Hey' (2001) 64 *Modern Law Review* 710

Matthews, Paul, 'A Problem in the Construction of Gifts to Unincorporated Associations' (1995) *Conveyancer* 302

McCay, B. J., 'The Making of an Environmental Doctrine', in K. Milton (ed.), *Environmentalism: The View from Anthropology* (London: Routledge, 1995)

McMeel, Gerard, 'The Redundancy of Bailment' (2003) *Lloyd's Maritime and Commercial Law Quarterly* 169

McNeil, K., *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989)

Megarry, R. M., and Wade, H. W. R., *The Law of Real Property* (5th edn, London: Stevens and Sons, 1984)

Melville, Herman, Moby-Dick (Everyman's Library, 1907)

Merrill, Thomas W., 'Property Rules, Liability Rules, and Adverse Possession' (1984–5) 79 *Northwestern University Law Review* 1122

'Time, Property Rights and the Common Law: Introduction' (1986) 64 *Washington University Law Quarterly* 661

(ed.), 'Symposium: Time, Property Rights, and the Common Law: Round Table Discussion' (1986) 64 *Washington University Law Quarterly* 793

Michelman, Frank, 'Ethics, Economics and the Law of Property', in J. Roland Pennock and J. Chapman (eds.), *Nomos XXIV: Ethics, Economics and the Law* (New York: New York University Press, 1982)

Mill, John Stuart, *Principles of Political Economy*, Book II (London: Penguin Classics, 1985)

Moffat, G., *Trusts Law: Texts and Materials* (3rd edn, London: Butterworths, 1999)

Mokal, Rizwaan Jameel, 'The Search for Someone to Save: A Defensive Case for the Priority of Secured Lending' (2002) 22 *Oxford Journal of Legal Studies* 687

'The Floating Charge – A Eulogy', in R. J. Mokal, *Corporate Insolvency Law – Theory and Application* (Oxford: Oxford University Press, 2005), Chapter 6

Mortensen, D. T., 'Property Rights and Efficiency in Mating, Racing and Related Games' (1982) 72 *American Economic Review* 968
Munzer, Stephen E., *A Theory of Property* (Cambridge: Cambridge University Press, 1990)
Neave, M. A., Rossiter, C. J., and Stone, M. A., *Sackville and Neave Property Law: Cases and Materials* (6th edn, Sydney: Butterworths, 1999)
Nolan, R. C., 'Property in a Fund' (2004) 120 *Law Quarterly Review* 108
Nozick, Robert, *Anarchy, State, and Utopia* (Oxford: Basil Blackwell, 1974)
Palmer, N. E., *Bailment* (2nd edn, London: Sweet & Maxwell, 1991)
Penner, J. E., 'The "Bundle of Rights" Picture of Property' (1996) 43 *UCLA Law Review* 711
Perillo, Joseph, 'The Statute of Frauds in the Light of the Functions and Dysfunctions of Form' (1974) 43 *Fordham Law Review* 39
Pigou, A. C., *The Economics of Welfare* (London: Macmillan, 1952)
Pollock, F., and Maitland, F. W., *The History of English Law* (2nd edn, Cambridge: Cambridge University Press, 1898)
Pollock, F., and Wright, R. S., *Possession in the Common Law* (Oxford: Clarendon Press, 1888)
Posner, Richard A., *Economic Analysis of Law* (6th edn, New York: Aspen Publishers, 2002)
Radin, Margaret Jane, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957
'Time, Possession, and Alienation' (1986) 64 *Washington University Law Quarterly* 739
Reinterpreting Property (Chicago: University of Chicago Press, 1993)
Reich, Charles, 'The New Property' (1964) 73 *Yale Law Journal* 733
'Individual Rights and Social Welfare: The Emerging Legal Issues' (1965) 74 *Yale Law Journal* 1245
'Beyond the New Property: An Ecological View of Due Process' (1990–1) 56 *Brooklyn Law Review* 731
Rideout, Roger, 'The Limited Liability of Unincorporated Associations' (1996) 49 *Current Legal Problems* 187
Robbins, Lionel, *An Essay on the Nature and Significance of Economic Science* (London: Macmillan, 1935)
Rogers, W. V. H., *Winfield and Jolowicz on Tort* (16th edn, London: Sweet & Maxwell, 2002)
Rook, D., 'Property Law and the Human Rights Act 1998: A Review of the First Year' (2002) *Conveyancer* 316
Roper, R. B., *et al.*, *Ruoff and Roper on the Law and Practice of Registered with notes by Conveyancing* (2nd looseleaf edn, London: Sweet & Maxwell, 2003)
Rose, Carol M., 'Possession as the Origin of Property' (1985) 52 *University of Chicago Law Review* 73
Rousseau, Jean-Jacques, *A Discourse on the Origins of Inequality* (ed. R. D. Masters and C. Kelly, University Press of New England, 1992)
Royal Commission on Common Land, *Report of Royal Commission on Common Land 1955–1958* (Cmnd 462, London: HMSO)
Rudden, Bernard, 'Economic Theory v. Property Law: The "Numerus Clausus" Problem', in J. Eekelaar and J. Bell (eds.), *Oxford Essays in Jurisprudence: Third Series* (Oxford: Oxford University Press, 1987), p. 239

'Things as Thing and Things as Wealth' (1994) 14 *Oxford Journal of Legal Studies* 81

Ruoff, T. B. F., *An Englishman Looks at the Torrens System* (Sydney, Melbourne and Brisbane, 1957)

Ryan, Alan, *Property and Political Theory* (Oxford: Basil Blackwell, 1984)

Sackville, R., 'Property Rights and Social Security' (1978) 2 *University of New South Wales Law Journal* 246

'The Emerging Australian Law of Native Title: Some North American Comparisons' (2000) 74 *Australian Law Journal* 820

Sax, J. L., 'The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention' (1969–70) 68 *Michigan Law Review* 471–566

Schwartz, A., 'Security Interests and Bankruptcy Priorities: A Review of Current Theories' (1981) 10 *Journal of Legal Studies* 1

Scott, R. E., 'A Relational Theory of Secured Financing' (1986) 86 *Columbia Law Review* 901

Seipp, D., 'The Concept of Property in the Early Common Law' (1994) 12 *Law and History Review* 29

Simpson, A. W. B., *A History of the Land Law* (2nd edn, Oxford: Clarendon Press, 1986)

Smith, Adam, *The Wealth of Nations* (London: Everyman's Library, 1991)

Sokol, Mary, 'Bentham and Blackstone on Incorporeal Hereditaments' (1994) 15 *Legal History* 287

Sreenivasan, Gopal, *The Limits of Lockean Rights in Property* (Oxford: Oxford University Press, 1995)

Stevenson, Glen G., *Common Property Economics: A General Theory and Land Use Applications* (Cambridge: Cambridge University Press, 1991)

Stillmann, Peter G., 'Property, Freedom and Individuality in Hegel's and Marx's Political Thought', in J. Roland Pennock and John Chapman (eds.), *Nomos XXII: Property* (New York: New York University Press, 1980), Chapter 6

Stone, Christopher, 'Should Trees Have Standing? – Towards Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 450

Sugarman, David, and Warrington, Ronnie, 'Telling Stories: Rights and Wrongs of the Equity of Redemption', in J. W. Harris (ed.), *Property Problems: From Genes to Pension Funds* (London: Kluwer, 1997)

Swadling, W., 'The Proprietary Effect of a Hire of Goods', in N. Palmer and E. McKendrick (eds.), *Interests in Goods* (2nd edn, London, Lloyd's of London Press, 1998), p. 491

Tawney, R. H., 'Property and Creative Work', in R. H. Tawney, *The Acquisitive Society* (New York: Harcourt, Brace and Howe, 1920)

Tehan, Maureen, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27 *Melbourne University Law Review* 523

Tettenborn, A., 'Covenants, Privity of Contract and the Purchaser of Personal Property' (1982) *Cambridge Law Journal* 82

Tully, James, *A Discourse on Property: John Locke and His Adversaries* (Cambridge: Cambridge University Press, 1980)

An Approach to Political Philosophy: Locke in Contexts (Cambridge: Cambridge University Press, 1993)

Turner, Richard W., *The Equity of Redemption* (Cambridge: Cambridge University Press, 1931)

Umbeck, J., 'A Theory of Contract Choice and the California Gold Rush' (1977) 20 *Journal of Law and Economics* 421

Waldron, Jeremy, *The Right to Private Property* (Oxford: Clarendon Press, 1988)

Weir, Tony, *A Casebook on Tort* (10th edn, London: Sweet & Maxwell, 2004)

Weiss, E. B., 'The Planetary Trust: Conservation and Intergenerational Equity' (1983–4) 11 *Ecology Law Quarterly* 495–581

Whalan, D. J., 'Title by Possession and the Land Transfer Act' (1963) 48 *New Zealand Law Journal* 524

Whelan, F. G., 'Property as Artifice: Hume and Blackstone', in J. Roland Pennock and John Chapman (eds.), *Nomos XXII: Property* (New York: New York University Press, 1980), Chapter 5

White, J. J., 'Efficiency Justifications for Personal Property Security' (1984) 37 *Vanderbilt Law Review* 473

Whiteman, J., 'Nuisance – The Environmental Tort?' (1998) 61 *Modern Law Review* 870

Wu, Tang Hang, 'The Right of Lateral Support of Buildings from the Adjoining Land' (2002) *Conveyancer* 237

Zerbe, 'Time, Property Rights, and the Common Law' (1986) 64 *Washington University Law Quarterly* 793

Index

abandonment
  Australia 147–8, 169, 174
  custom 169, 174
  mortgages 691–2
  non-use 161, 172
  powers 22
aboriginal populations
  Australia 112, 138–52, 169
  clans/bands 177
  nomadic land use 112, 139, 143, 265
  occupation 112, 120–1, 138–52, 173–9
  particular use rights 280
  title *see* native title
  traditional way of life 174
  United States 112, 120–1
absolute entitlements
  equitable interests distinguished 314
  future interests 299–300, 302, 303
  title claims 383, 386, 387
  see also entitlements; title
absolute monarchy 82
absolute in possession 213, 310
Ackerman, Bruce 182, 191, 374
acquisition of title
  derivative *see* derivative acquisition
  first *see* first occupancy; first taking
  goods 443–7
  grant *see* grant
  just acquisition 13, 14, 83, 84–7, 89, 92, 112, 122
  methods 489–511
  original acquisition 83–4, 86, 112, 113, 384–6
  possession 406–7
  transfer *see* transfer
adverse possession
  acquisition of title 406–10, 489–90
  animus possidendi 408
  derivative interests 409–11
  eviction 407, 434
  good faith 413–42
  human rights 412–13, 430
  incompatibility argument 440–2
  intention 408–9
  knowledge 409
  local authorities 431–2
  necessary evil 429–42
  objections 407
  personhood 414
  prescription distinguished 489–90
  principle/proof 417–20
  problems of proof 436–8
  property theory 424
  registered land 407, 412–13, 428
  requirements 408–9
  rules, operation 406–10
  stale claims 433–5
  state claims 433–5
  third parties 409–10
  unregistered land 407, 433
  utilitarianism 411, 414, 422, 423–4
  wrongful takers 111
  see also squatters
agency, control 265
Alexander, Gregory S. 323, 326–32
alienation
  alienability 640–5
  Australia 148, 173
  bailment 654–5
  capital interest 197
  contracts 23, 159, 643–4
  Crown 174
  enforcement 645–8
  fixed-term tenancies 616
  forfeiture 23, 159
  landlord's interest 641
  leases 23, 640–8
  nemo dat rule 303
  private property 23, 159
  restrictions 22–3, 642–4
  restrictive covenants 349
  significance 157–9
  statutory control 643–4
  tenant's interest 640
  see also inalienable rights
allocation
  entitlements 224–6, 235–6, 238–9
  new things 123

allocation (cont.)
property rights 107–52
provision distinguished 38
alternative contingencies 302
ancient buildings 493
Anderson, Terry L. 42–5
animals
fishing quotas 537–8
fox hunting 128, 129–30
livestock 124–7
oyster fisheries 169, 627
swans 146
whaling 128–9, 132–8
wild animals 128–38
annexation
Crown 138
native title 178
anticommons property 41–2
appurtenant rights
commons 167–8
easements 158, 343, 498, 542
inalienable rights 158–9, 167
re-entry 162
Aristotle 681
assets
common pool 117
companies 321, 324–5
financial, concurrent interests 575
fluctuating 156–7, 335
funds 50–1
insolvency 337–9
trusts 312, 334, 335
assignment
co-ownership 39
fixed-term tenancies 616
leases 271
liabilities 646, 648
privity of contract 646
auctioneers and conversion 284
Austin, John 198, 464
Australia
abandonment 147–8, 169, 174
aboriginal populations 112, 138–52, 169
alienation 148, 173
colonisation 138–52
custom 147–8, 169, 174
extinguishment 141, 143, 147, 173, 175
native title 149–52, 169, 173–9
surrender 148, 174
terra nullius 140–5
Torrens registration 49, 544, 546, 548

bailment
alienation 654–5
beneficial use 612
categories 649–50
characteristics 280–1, 648–51
consent 281, 610
conversion 284–5
enforcement 282, 611, 655
finders 281, 610
forfeiture 162
leases compared 280–1, 609–12
legal interests 313
liabilities 612, 651–2
locus standi 655
meaning 160
obligations 281–2
possession 280–2, 611, 653–4
property law 648–56
property relationships 17, 653–6
proprietary indicia 655–6
proprietary status 612
rights 282
self-help remedies 286
shipping 655
theft 281, 610
third parties 655
trespass to goods 286
unauthorised 610, 611
Ballantine, H. W. 419
bankruptcy
disclaimer 161
leases 164
licences 164
residential property 51–2, 64
title 338, 454, 479
trustees in bankruptcy 338, 454
see also insolvency
Bartlett, Richard 151–2, 174, 175
Barzel, Yoram 61, 75, 78, 116
Beaglehole, Earnest 182
Becker, Lawrence 59, 107, 205–6, 208–11
Bellamy, Edward 327
beneficial interests
administration of estates 335–7
equitable interests 314
overreaching 525–9
beneficiaries
choses in action 334
fragmentation of ownership 334–5
funds 50–1
occupation 525–9
overreaching 524–9
personal representatives 336–7
trusts of land 626–7
Bentham, Jeremy 111, 184, 220, 349, 376
Berg, Alan 672
Berle, Adolf A. 322, 323, 325–32
Birks, Peter 449, 455, 456, 461–4, 513, 553, 555
Blackstone, William 183–4, 204, 349
body cells
cell lines 3–4, 9–12
disclosure 8
excised 8–9
ownership 4–16

property rights 8–15
unexcised 4–7
bona fide purchaser
certainty 516
equitable interests 457, 462, 514, 516
equity's darling 514, 515–16
good faith requirement 518–19
inquiries/inspections 517
nemo dat rule 401–2
notice 514, 515–23
Pilcher v. *Rawlins* 516, 519–22
boundaries 541
broadcasting
race meetings 356–68
see also television reception
Buckle, Stephen 83, 84
Buckley, F. H. 661
bundles of rights
legal relations 191
native title 175
ownership 183, 184, 187, 190, 194
Burke, Edmund 678

cadastral systems 538–9, 540, 546–8
Calabresi, Guido 226, 227, 228, 229, 230, 238–49, 415, 491
Canada, native title 179, 280
capital interest
alienation 197
destruction 197
disposition 197
incidents of ownership 5, 7, 196–7
overriding interests 11–12
capture
control 128
efficiency 129
interlopers 128, 129, 130
natural products 117, 128–38
whaling 128–9, 132–8
Carsberg, B. V. 322
certainty
bona fide purchaser 516
contingent interests 306–7
duration 621–4
native title 176
periodic tenancies 617–18
property interests 159, 348
Chakravaty-Kaul, Minoti 76
charges
fixed/floating 157, 665, 668
hypothecations 664–5
land charges 459
legal mortgage 665–7
charging orders 659
charterparties 350–1, 655
chattels
co-ownership 594–5, 599
interference 350–1
joint ownership 574
ownership 215, 574, 594–5, 599
see also goods
Cheffins, Brian 323
choses in action
bank accounts 399
beneficiaries 334
claim-rights 20, 84, 189, 206, 208
Clarke, Alison 293–5, 407, 412, 413, 427–42, 491, 566, 615, 616, 655
clubs, communal property 39
co-ownership
assignment 39
basic concepts 572–6
chattels 594–5, 599
classical approach 572–99
commonhold 599
communal property distinguished 39–40, 340
conversion 599
exclusions/restrictions 592–3
forms 599–608
fragmentation of ownership 339–42
incidents of ownership 11
joint ownership 573–5
land 341–2, 591–5, 596–7
matrimonial home 342, 596–8
nemo dat rule 599
occupation 591–3
ownership in common 572–3
powers 39
property law 571–608
public trusts 605–8
sale of land 596–9
survivorship 579–82
trusts 11, 341–2
unincorporated associations 599–604
see also ownership
Coase, Ronald 225–6
Coase theorem 75, 78, 235
Cohen, Felix 122–4, 371
Coleman, Jules L. 227
colonisation
Crown 146
property rights 138–52
radical title 146
settlement 118, 141, 142, 144
commonhold 599, 615
commons
anticommons property 40–2
appurtenant rights 167–8
first taking 83
glebe land 499–507
Locke (John) 84
meaning 75–6
pollution 63–4
registration 169
rights of commons 167–8
tragedy of the commons 60–5, 168
communal property
allocation of resources 38

communal property (cont.)
  clubs 39
  co-ownership distinguished 39–40, 340
  conservation 169
  custom 279
  disadvantages 65–8
  externalities 66, 67
  general use rights 40, 278
  grazing rights 61, 168
  inalienable rights 158, 167, 177
  limited access 36, 39–40, 167, 168
  meaning 35, 65, 69
  negotiating costs 65–6
  no-property distinguished 37, 38, 75–6
  open access 36–8
  ownership rights 65
  particular use rights 40, 278
  provision of resources 38
  regulation 38
  right not to be excluded 181
  scope 167
  self-regulation 168
  special features 167–72
  state property distinguished 37
  tradable entitlements 40
  see also commons
companies
  assets 321, 324–5
  closely held 322
  corporate governance 186, 321
  deeds 454
  directors 321, 322
  efficiency 321, 322
  insolvent liquidation 337–8
  land management *see* management companies
  legal personality 320–1
  limited liability 321, 322, 324–5
  listed companies 322
  nexus of contracts 323
  public control 330–2
  see also corporate ownership; shareholders
compliance, formalities 452–3
confidential information 378
consent
  bailment 281, 610
  leases 609–10
  property rights 83
constructive trusts
  creation 333, 453
  enforcement 155–6
  mortgagees 333
consumer credit 455, 460–1, 672
contingent interests
  alternative contingencies 302
  certainty 306–7
  condition subsequent 304, 305
  contingent duration 304–6
  determinable interests 305, 306
  future interests 301–2
contracts
  alienation 23, 159, 643–4
  companies 323
  contract holding theory 602
  enforcement 26, 155–6, 452–3, 610–11
  formalities 452–3, 455
  leases 281, 449–50, 610–11, 612
  liabilities 22
  licences 273
  negotiation 450
  nexus of contracts 323
  partial performance 395
  periodic tenancies 617–19
  property interests 471–84
  restrictive covenants 250
  sale of goods 472–3
  specific performance 471, 472–3
  unfair terms 673
  see also estate contracts
control
  agency 265
  capture 128
  contents 265–6
  effect of ignorance 267
  factual control 262–6
  incidents of ownership 5, 6, 7, 194, 196
  intention 265
  possession 262–6
  pre-existing ownership 107–8
  sea-bed 264–5
  trust property 312
  see also management
conversion
  bailment 284–5
  co-ownership 599
  damages 283, 285
  finders 284, 445–6
  limitation of actions 444–5
  locus standi 284–5
  meaning 284
  mortgagees 284–5
  possession 284
  property rights 8
  remedies 285
  theft 285, 347
  torts 283, 284–5
conveyancing
  do-it-yourself 550–3
  electronic 549–50, 555
  overreaching 524
Cooter, Robert 112–13, 129
copyright 348, 372
corporate governance 186, 321–32
corporate ownership
  freedom of action 15–16
  profit function 322, 325–6
  property holdings 320–32
  see also companies

costs
- formalities 457, 461
- negotiation 65–6
- *see also* transaction costs

Council of Mortgage Lenders 662, 685, 688–95
credit
- consumer credit 455, 460–1, 672
- extortionate credit bargains 673
- supply 669–70

CREST 451
criminal liability
- forcible entry 291
- possession 686
- theft 444
- trespass to land 291–2

Critchley, Patricia 456, 458
Crown
- absolute monarchy 82
- alienation 173
- annexation 138
- feudal system 146, 308, 542
- franchises and manors 542

Cunningham, R. A. 17–18
custom
- abandonment 169, 174
- Australia 147–8, 169, 174
- customary rights 168–70
- first occupancy 108–9
- long user 454
- possession 119
- profits a prendre 169
- variation 174

cybersquatting 130–2

Dahlman, Carl 76
Dales, J. H. 185, 214
damages
- conversion 283, 285
- private nuisance 229
- trespass 286

Dasgupta, P. 116
De Alessi, Louis 76
deadweight losses 133
death, administration of property 335–7
deeds
- companies 454
- forgery 453
- gifts 450
- leases 450
- legal interests 450
- mortgages 452
- requirements 454–5

delivery, goods 450
Demsetz, Harold 61, 65–8, 69–70, 74, 79, 321, 324–5
derivative acquisition
- disposition 384, 448
- equitable title 403–4
- formalities 448–71
- grant 384, 402, 448, 449, 640–1
- property interests 384, 402, 403–4, 448–88

derivative interests
- adverse possession 409–10
- enforcement 395, 410
- extinguishment 641
- holders 647–8
- leases 640–2
- *nemo dat* rule 394–5, 402–3
- priority 394, 395

destruction
- capital interest 7
- private property 198

determinable interests
- contingent interests 305, 306
- forfeitable interests distinguished 306
- trusts 305

detinue 284
Dewey, John 329
Dharmapala, Dhammika 129–30, 131
Diamond, Aubrey 398
disclaimer 161
distress for rent 286, 288, 293–5
distributional preferences 226, 228, 242, 244
Dockray, Martin 412
Dodd, E. Merrick 331, 332
domain names 130–2, 378
dominium 212–13, 215
duration
- absence of term 199
- certainty 621–4
- contingent duration 304–6
- easements 310
- fee simple 309
- fee tail 213
- fixed-term tenancies 310, 613–15
- future events 622–4
- interests, condition subsequent 305–6
- leases 159, 272, 304, 307, 310, 611
- licences 273
- life estate 213, 309
- particular use rights 310
- periodic tenancies 310, 619–20
- perpetual 86, 87, 146
- profits a prendre 310
- status rights 161
- tenancy at will 310, 618

easements
- appurtenant rights 158, 343, 498, 542
- dominant/servient tenements 349
- duration 310
- extinguishment 343
- implied rights 454
- land values 343
- overriding interests 557–8
- particular use rights 279–80, 343, 347
- prescription 490, 493, 542
- registered land 542

easements (cont.)
  see also rights of way
Easterbrook, F. 323
economic analysis
  competition for resources 43–4
  economic growth 73–4
  efficiency 46, 48–50, 112–13
  externalities 45–7, 61, 66, 67
  individual actors 42–3
  key concepts 45–50
  motivation 71–2
  opportunity cost 43
  postulates 43–5
  private property 66–74
  property rights 42–50
  property rights justified 59–81
  purpose 42–5
  rationality 43
  scarcity 42, 43
  transaction costs 47–8, 225–6
  value maximisation 43, 46, 48, 49, 66, 70
efficiency
  capture 129
  companies 321, 322
  economic analysis 46, 48–50, 112–13
  entitlements 226, 228, 235–6, 244
  externalities 46
  forms of ownership 79–81
  inalienable rights 243–4
  Kaldor-Hicks efficiency 49–50
  Pareto efficiency 49, 420
  prescription 490–1
  security interests 661
  self-adjusting 46–7
  value 48–9
electronic transactions
  conveyancing 549–53, 555
  formalities 451–2, 455, 459–60
Ellickson, Robert C. 76, 128–9, 132–8, 421, 425
enforcement
  against strangers 107–8, 441
  alienation 645–8
  bailment 282, 611, 655
  contracts 26, 155–6, 452–3, 610–11
  derivative interests 395, 410
  equitable interests 457–8, 513–14
  first taking 107–8, 513
  formalities 452–3
  fragmentation of ownership 10, 11
  hire agreements 19
  leases 611
  legal interests 513
  licences 282
  mortgages 688–95
  non-judicial 660
  non-proprietary interests 155–6
  notice 12, 519
  personal rights 155, 160, 164–6, 274, 347
  priority 512–36
  property interests 10–12, 155–6, 160
  registered land 553–4
  registration 514–15
  restrictive covenants 250–2, 614
  rules 512–15
  security interests 660, 684–7
entitlements
  absolute *see* absolute entitlements
  allocation 224–6, 235–6, 238–9
  combination of rules 227–31
  communal property 40
  efficiency 226, 228, 235–6, 240–4
  inalienable rights 227, 243–4
  joint ownership 341
  liability rules 227, 240–2
  Locke (John) 414–16, 421–2
  long user 490–2
  principle 423–4
  property rules 227, 240–2
  protection 226–31, 240–4, 406
  rights analysis 19–24
  setting 239
  tradable entitlements 40
  see also title
environment
  polluter pays 123
  pollution *see* pollution
  tragedy of the commons 63–4
Epstein, Richard A. 110, 111–12, 113–16, 117, 369, 410, 411, 412, 415, 416–20, 423, 424, 436, 442
equitable interests
  absolute entitlements distinguished 314
  beneficial interests 314
  bona fide purchaser 457, 462, 514, 516
  enforcement 457–8, 513–14
  failed formalities 311–12, 452
  fallacies 313–20
  fee simple 471–2
  goods 313, 450
  land 313
  legal interests distinguished 311–14, 452
  life estate 309
  matrimonial home 312–13
  novel interests 312
  origins 311
  overreaching 523, 524
  ownership 404, 478
  priority 514
  resulting trusts 318–20
  retention of title 317
  shipping 538
  trusts 312, 314, 514
  Westdeutsche case 314–20, 333
equitable leases 312
equitable mortgages 452, 474, 664
equitable title
  derivative acquisition 403–4
  legal title compared 403–5

transfer 404
equity
charges 664–5
conscience 516
deserted wife's equity 353–6
legal rules, modification 453–4
supervisory jurisdiction 669–70
equity of redemption 666, 669, 673–80, 685
estate contracts
enforcement 26
rule 471–2, 473
estate owners, legislation 214, 215
estates
doctrine 213
particular use rights 310
see also tenures and estates
estoppel, *nemo dat* rule 396, 402–3, 636, 637
Etheleriadis, P. 374
eviction
adverse possession 407, 434
residential property 290–1
evidence
formalities 456, 464–5
long user 496
trusts of land 450
exchange value 53–4, 57
exclusion
intention 266–7
non-owners 180–1
occupation/possession 274
execution, liabilities 200–1
expectancies 300–2
expropriation 200–1
externalities, economic analysis 45–7, 61, 66, 67
extinguishment
abandonment *see* abandonment
Australia 141, 143, 147, 169, 173, 175
derivative interests 641
easements 343
express 147
fee simple 146
implied by inconsistent grant 147
limitation of actions 391–3, 406, 409
overreaching 524
rights of commons 167
title/intruders *see* adverse possession

failed formalities
equitable interests 311–12, 452
general rule 473
invalidity 452–3
land 474–5
sale of goods 475
Farrand, J. T. 566, 615, 616
Feather, J. 348
fee simple
absolute in possession 213, 310
duration 309
equitable interests 471–2
extinguishment 146
interests, condition subsequent 306
fee tail, duration 213
Fennell, Lee Anne 41, 42, 76
feudal system, land ownership 146, 308, 542
Filmer, Robert 82, 83, 85
finders
bailment 281, 610
conversion 284, 444–5
lost property offices 444–5
possession 266, 386, 445–6
property rights 108
trespass to goods 285
first occupancy
actual possession 14
communitarian objection 112
custom 108–9
dissipation of value 116, 118
emotional bonds 111, 119
encroachment 115
future value 112–13, 116
intuitive ordering 108–9
libertarian justification 111–12
premature occupation 116–18, 128
priority 113–15
property rights 107–22
public order 109–10
rent-seeking 117
signalling 110–11
simplicity 110
transaction costs 114
United States 112, 116, 118, 120–2
first taking
commons 83
enforcement 107–8, 513
intangible property 107
priority 416–17
Fischel, D. 323
fixed charges, floating charges distinguished 157, 665, 668
fixed-term tenancies
alienation 616
assignment 616
break clauses 616
buildings, life 614
commercial premises 615–16
discontinuous 614
duration 310, 613–15
leases 272, 310, 613–16
legal position 613–14
meaning 272
practical length 614–15
rent 615–16
termination 616
Flathman, Richard E. 208–11
Fleming, J. 220
floating charges 157, 665, 668
fluctuating assets
floating charges 157

fluctuating assets (cont.)
  identification of subject matter 156–7
  trusts 157, 336
forfeiture
  alienation 23, 159
  bailment 162
  interests, condition subsequent 305, 306
  leases 23, 161, 288
  meaning 161–2
  re-entry 162, 163, 288–90
  relief 163, 306
  self-help remedies 163, 288–90
  specific performance 162
  unfairness 162–3
forgery, deeds 453
formalities
  cautionary function 456–7, 465
  ceremonies 449
  channelling function 457–8, 465–6, 519
  clarification 458–9
  compliance 452–3
  consumer credit 455, 460–1
  contracts 452–3, 455
  costs 457, 461
  deeds *see* deeds
  deposit of documents 474
  derivative acquisition 448–71
  disadvantages 460–1
  earmarking 458, 485
  electronic transactions 451–2, 455, 459–60
  enforcement 452–3
  equitable mortgages 452
  evidence 456, 464–5
  excepted transactions 453–4
  failure *see* failed formalities
  functions 455–60, 464–8
  gifts 450, 458, 468–70
  hard cases 460–1, 463
  human rights 460–1
  land charges 459
  legal advice 456–7
  legal title 453
  mortgages 452, 459
  obligations 458
  option to purchase 479, 480
  prescribed forms 455, 457
  publicity 459
  registration 451–2
  rules, nature and content 448–50
  state functions 459–60
  Walsh v. *Lonsdale* 460, 471–2, 473, 475–6
Fox, David 400–2
fox hunting 128, 129–30
fragmentation of ownership
  beneficiaries 334–5
  capital 303
  co-ownership 339–42
  contingent duration 304–6
  disintegration 187, 214
  enforcement 10, 11
  future *see* future interests
  general use rights 342–3
  income/enjoyment 303
  insolvency 337–8
  joint ownership 340–2
  leases 304
  management/control/benefit 320–39
  managerial property holding 332–9
  particular use rights 342–3
  present *see* present interests
  property interests 297–344
  time slices 51, 298, 299, 303
  trusts 333–5
France, *legitima portio* 191
fraud
  registered land 453
  trustees 516, 519–22
free-riders 48, 80
freehold tenure 309
fugitive resources 128
Fuller, Lon 456, 457, 464–8
funds 51
fungibles 53, 55, 283
Furey, Nigel 654
future interests
  absolute entitlements 299–300, 302, 303
  alternative contingencies 302
  condition subsequent 304, 305–6
  contingent *see* contingent interests
  creation, restrictions 311
  determinable interests 305, 306
  expectancies 300–2
  fragmentation of ownership 297–311
  inchoate interests 302, 303
  possibility of reverter 305
  pre-emption 301–2, 479–80
  remainder interests 298–9, 302, 305
  residuarity 304
  resulting trusts 299
  reversionary interests 298–9, 302, 304, 305, 641
  successive *see* successive interests

Gallie, W. B. 217
Gearty, C. 219
general use rights
  communal property 40, 279
  fragmentation of ownership 342–3
  meaning 278–9
gifts
  deeds 450
  formalities 450, 458, 468–9
  unincorporated associations 600–4
Gladstone, William Ewart 371
Golinveaux, J. 130–2

good faith
  adverse possession 413–43
  good faith requirement 518–19
  purchasers *see bona fide* purchaser
Goode, R. M. 383, 398–9, 403–5, 654, 665
Goodman, M. 414
goods
  acquisition of title 443–7
  bailment *see* bailment
  conversion *see* conversion
  delivery 450
  equitable interests 313, 450
  legal interests 313
  limitation of actions 393, 444–5
  loss of title 283
  market overt 397–8
  mortgages 666
  nemo dat rule 397–8
  sale *see* sale of goods
  torts 282–3, 444
  trespass *see* trespass to goods
  wrongful interference 283, 285, 393
  see also things
grant
  derivative acquisition 384, 402, 448, 449, 640–1
  implied/presumed 453–4, 496, 498
  option to purchase 25
  particular use rights 496–7
  possession 625–33
  proprietary terms 645
Gray, J. C. 20–2
Gray, Kevin 181–2, 251, 353, 376, 544, 605
Gray, S. F. 251, 544
grazing rights
  communal property 61, 168
  long user 491–2
  severance 170–1
  tradable rights 40
Grey, Thomas C. 183, 184, 186–8, 191, 214, 373, 375
Grotius, Hugo 83
group ownership 339–42
Grunebaum, James O. 59, 61, 68–74, 79, 80–1, 182

Hadden, Tom 323
Haddock, David 110, 112, 113, 115–18, 128
Hallowell, Irving 211
harassment 291
Hardin, Garrett 60–5, 75–6, 167, 168
Hargreaves, A. D. 183, 198, 213–14
Harpum, Charles 524
Harris, J. W. 215
Hart, H. L. A. 191–2
Hegel, G. W. F. 181, 182, 411, 424
Heller, Michael 40, 41, 42
Helmholz, Richard 415, 435
Hindu law 125–6
hire agreements 4, 18–19
Hobbes, Thomas 209
Hohfeld, Wesley Newcomb 19–33, 35, 84, 189, 192, 206–8, 227, 329
holdouts 48, 70
Holdsworth, William 287, 654
Honoré, A. M. 4–5, 7, 11, 35, 57, 183, 184, 192–210, 217, 227, 259, 297, 298, 314
housing *see* residential property
Hudson, Anthony 161
human rights
  adverse possession 412–13, 430
  formalities 460–1
Hume, David 111, 118–19

identification of subject matter
  basic principle 156–7
  fluctuating assets 156–7
  native title 176
inalienable rights
  appurtenant rights 158–9, 167
  communal property 158, 167, 177
  efficiency 243–4
  entitlements 227, 243–4
  status rights 158
incidents of ownership
  absence of term 199
  capital interest 5, 7, 196–7
  co-ownership 11
  execution, liabilities 200–1
  harm prevention 200, 204
  income 5, 196, 611
  lesser interests 201–3
  management/control 5, 6, 7, 194, 198
  meaning of ownership 4–7, 193–206
  personal use 5, 6–7, 177, 195
  possession 5, 194–5
  security 197–8
  transmissibility 5–6, 198–9
income
  fragmentation of ownership 303
  incidents of ownership 5, 196
  value 123
inconsistent grant 147
indemnities, registered land 566–8
insolvency
  assets 337–8
  disclaimer 161
  fragmentation of ownership 337–8
  liquidation 163
  mortgages 163–4
  personal *see* bankruptcy
  property rights 163–4
  unascertained property 485
intangible property
  capitalism 187
  first taking 107
  intellectual *see* intellectual property
  property rights 18
intellectual property
  competition 115

intellectual property (cont.)
  copyright 348, 372
  domain names 130–2, 378
  first taking 110, 115
  forfeiture 162
  licensing 15
  trademarks 131, 132
intention
  adverse possession 408–9
  control 265
  exclusion 266–7
  possession 266–7, 408
interest rates 669, 671, 672
interference with goods 283, 285, 393, 599
the Internet
  domain names 130–2, 378
  new property rights 372
invalidity
  failed formalities 452–3
  non-registration 546
investment, pre-emption 113
Ireland, Paddy 186, 323, 669, 680–3

Jackson, T. H. 662
joint ownership
  acting upon one's share 582–3
  chattels 574
  co-ownership 573–5
  conversion 340–1
  entitlements 341
  fragmentation of ownership 340–2
  interest 577
  mutual agreement 583–4
  mutual conduct 584
  possession 577
  severance 341, 573, 580–2, 584–5
  time 578
  title 578
  trustees 573–4
  unities 576–8
justice considerations 226

Kaldor-Hicks efficiency 49–50
Kimble, Melinda 371
Kramer, Matthew H. 84, 88–9
Kraus, Jody 227
Kronman, A. T. 662

labour
  just acquisition 13, 14, 83, 84–7, 89, 122
  markets 72
  value 85, 86
land
  co-ownership 341–2, 591–5, 596–7
  concurrent interests 575–6, 642
  equitable interests 313
  failed formalities 474–5
  interference with land 219–50
  legal interests 313
  nemo dat rule 402–3
  nomadic use 112, 139, 143, 265
  ownership 213–15
  possession 271–80
  registration *see* registered land
  trespass *see* trespass to land
  trusts 341–2
  unregistered 391, 407, 433
land charges, formalities 459
Land Registry
  consultation document 412, 413, 428–33, 438, 440, 479, 482–3, 540, 548–53, 558
  indemnity claims 567–8
  information sharing 539
  voluntary registration 540
  see also registered land
Law Commission
  conversion 284, 285, 393
  deeds 454–5
  distress 288, 293–5
  electronic transactions 451
  forfeiture 288
  land registration 412, 413, 428–33, 438, 440, 479, 482–3, 540, 548–53, 555–9
  limitation of actions 407
  mortgages 459, 474, 666–7
  overreaching 523, 525, 527, 529–35
  perpetuities 311
  pre-emption 482–3
  prescription 498–9
  re-entry 288, 289
  sale of goods 485
Law, John 54
Law Reform Committee, prescription 490, 498–9, 507–10
Lawson, F. H. 185, 212, 214, 287, 572–6, 580
leases
  alienation 23, 640–8
  assignment 272
  bailment compared 280, 609–12
  bankruptcy 164
  beneficial use 611–12
  caveat emptor 612
  characteristics 613–40
  concurrent leases 642
  consent 609–10
  contracts 280, 449–50, 610–11, 612
  deeds 450
  derivative interests 640–2
  disclaimer 161
  disguised as licences 275–6
  distress 286, 288, 293–5
  distress for rent 286, 288, 293–5
  duration 159, 272, 304, 307, 310, 611, 613
  enforcement 611
  exclusive possession 274, 275
  forfeiture 23, 162, 288

fragmentation of ownership 304
licences distinguished 271–8
non-proprietary interests 612, 636–8
non-proprietary terms 646–7
oral contracts 449–50
possession 611
privity of estate 645
property law 613–48
proprietary status 612
registered land 540
self-help remedies 286
term of years 213
see also tenancies
legal interests
deeds 450
enforcement 513
equitable interests distinguished 311–14, 452
goods 313
land 313
ownership 404
priority 514
registered land 452
legal mortgages 542, 660, 662–3, 665–7
legal realism 327, 329, 330
legal title
equitable title compared 403–5
formalities 453
see also title
legislation
estate owners 214, 215
ownership 215–16
public nuisance 218
security interests 672–3
liabilities
bailment 612, 651–2
contracts 22
duty to sell 25
execution 200–1
limited liability companies 321, 322, 324–5
ownership divested 24
post-assignment 646, 648
powers compared 31–2
rules, entitlements 227, 240–2
trustees 334, 336
licences
bankruptcy 164
contracts 273
duration 273
enforcement 282
exclusive possession avoided 275–6
implied licence doctrine 408
leases distinguished 271–8
scope 273
specific performance 160–1
tenancies distinguished 273–6
licensing
control 5, 7
intellectual property 15
liens 665
life estate, duration 213, 309
limitation of actions
conversion 444–5
extinguishment of title 391–3, 406, 409
goods 393, 444–5
public policy 445
recovery of possession 406
liquidation 337–8
livestock 124–7
local authorities
adverse possession 431–2
residential property 637
Locke, John
adverse possession 411, 414–15
commons 84
entitlements 414–16, 421–2
labour/just acquisition 13, 14, 83, 84–7, 89, 92, 112, 122
moral justification 81–2
original acquisition 83–4, 86, 112, 113
political theory 82, 113
present relevance 90–1
property rights 10, 59, 81–106
spoilation proviso 83, 89–90
substance 191
sufficiency proviso 83, 87–9
theology 82, 90, 92
locus standi
bailment 655
conversion 284–5
private nuisance 220–2
trespass 285–6
lodgers, long-term 220, 221
long user
acquiescence 497–8
custom 454
entitlements 490–2
evidence 496
negative uses 494–6
neighbouring land, support 493, 496, 498–9
original legitimacy 492, 497
payment 491–2
prescription 454, 489–91, 494–7
prospect 496, 497
rationale 492–4
losses
deadweight losses 133
title to goods 283
Lueck, Dean 108–9, 113, 124
Luther, Peter 581, 584

McChesney, Fred S. 42–5
McMeel, Gerard 654, 656
McNeil, K. 145
Macpherson, C. B. 373, 374, 375, 602
Maitland, F. W. 287, 449, 678
management
incidents of ownership 5, 6, 7, 194, 198
productivity, incentive 346

management (cont.)
  right to manage 196
  trusts of land 342
  see also control
management companies, *nemo dat* rule 276
managerial property holding
  fragmentation of ownership 333–9
  trusts 332–5, 333
Manchester, A. H. 670
Markesinis and Deakin 220, 222, 232–3
marketability
  registered land 538, 540, 546
  restrictive covenants 252
markets
  labour markets 72
  market overt 397–8
  role, private nuisance 225–6
Marshall, Alfred 328
Marshall, John 120
Marx, Karl 53, 74, 79
matrimonial home
  actual occupation 560
  co-ownership 342, 596–8
  deserted wife's equity 353–6
  equitable interests 312–13
  joint ownership 573
  legal advice 456–7
  occupation 312–13, 353–6, 560
  property rights 5–6, 353–6
  statutory rights 354
Matthews, Paul 601
Means, Gardiner C. 322, 323, 325–32
Megarry, R. 195, 618
Melamed, A. Douglas 226, 227, 228, 229, 230, 238–9, 415, 491
Melville, Herman 121, 132
Merrill, Robert 110–11, 412, 415, 420, 442
Michelman, Frank 41
mightiest possession 110, 115, 116, 118
migratory resources 117, 128
Mill, John Stuart 86–7, 109, 410–11
mistake, loan agreements 460–1
Moffat, G. 353
Mokal, Riz 661, 662
money
  intangible money 399
  meaning 398–9
  nemo dat rule 398–402
  physical money 398–9
Mortensen, D. T. 116
mortgagees
  constructive trusts 333
  conversion 284–5
  due diligence 686
  duty of care 687–8
  powers 24
  self-help remedies 286
mortgages
  abandonment 691–2
  arrears 688–91
  deeds 452
  enforcement 687–95
  equitable 452, 474, 664
  equity of redemption 666, 669, 673–80, 685
  formalities 452, 459
  goods 664
  indemnity insurance 694–5
  insolvency 163–4
  interest rates 669, 671, 672
  legal 542, 660, 662–3, 665–7
  loss recovery 695
  mortgage by demise 666–7, 685
  overreaching 526–7
  possession 626, 685–6, 691–5
  powers of sale 397, 658, 686–7, 693–5
  priority 514
  property transfer 663–4, 666
  receivership 684–5
  registered land 542, 665–6
  residential property 660, 662–3
  shipping 538, 655
  undue influence 456–7
Munzer, S. 206–8, 227

native title
  abandonment 174
  alienation 173
  annexation 178
  Australia 149–52, 169, 173–9
  bundles of rights 175
  Canada 179, 280
  certainty 176
  characteristics 173
  extent 175
  particular use rights 280
  proprietary rights 176–8
  subject matter 176
  variation 174
  see also aboriginal populations
natural law 82, 83
natural products
  capture 117, 128–38
  migratory resources 117, 128
  new things 122–7
natural resources
  exploitation 85–6
  no-property 84
  subsistence 89
Neave, M. A. 312
neighbouring land
  encroachment *see* adverse possession
  private nuisance 219
  support 493, 496, 498–9
nemo dat rule
  acquisition of title 384–6
  after-acquired property 402
  alienation 303

bona fide purchaser 400–2
case law 399–402
co-ownership 599
derivative interests 394–5, 402–3
estoppel 396, 402–3, 636, 637
exceptions 397–8
general principles 396–7, 402
goods 397–8
land 402–3
management companies 276
money 398–402
occupation 276
powers of sale 24, 396–7, 687
property law 391–403
public policy 393
registration 396–7
scope 394–5
security interests 658
theft 398, 399–402
volunteers 396
see also title
new property interests
comparative confirmation 368–71
deserted wife's equity 353–6
economic critique 368–71
new property thesis 373–6
quasi-property 376–8
recognition 345–79
reluctance to recognise 346–7, 356–68
Victoria Park Racing case 356–68, 377
new things 122–8
New Zealand 439
no-property
communal property distinguished 37, 38, 75–6
natural resources 84
ownerless things 36–7
Nolan, R. C. 51, 335
nomadic land use 112, 139, 143, 265
non-fungibles 52
non-owners 180–1, 186
non-proprietary interests
enforcement 155–6
leases 612, 636–8
non-use 161, 174, 187
norms, whaling 128, 132–8
North Sea oil and gas 75
notice
bona fide purchaser 514, 515–23
constructive notice 516–18
enforcement 12, 519
imputed notice 516, 517
meaning 516–18
occupation 562–3
registered land 543, 558
restrictive covenants 252
notice to quit
periodic tenancies 616–18, 622
repugnancy 617
Nozick, Robert 85, 87–8, 99–104, 121, 417, 421
nuisance
ownership 217–50
private *see* private nuisance
public 218
numerus clausus 159–60, 347

occupation
aboriginal populations 112, 120–1, 138–52, 173–9
actual occupation 560–5
co-ownership 591–3
constructive notice 518
first *see* first occupancy
joint interest 275
matrimonial home 312–13, 353–6, 560
minors 563–4
nemo dat rule 276
non-residential premises 561
notice 562–3
occupying beneficiaries 525–7
overriding interests 558–65
part occupation 564–5
personal occupation 561
physical presence 560
possession compared 273–6, 628–92
premature 116–18, 128
reserved rights 275
rights, causal connection 559, 562
sham rights 275, 278
statutory rights 627
offences *see* criminal liability
operation of law
tenancy at will 619, 622, 628
transfer 454
option to purchase
exercise 25–6, 336
expiry 336
formalities 479, 480
grant 25
original acquisition
title 83–4, 86, 112, 113, 384–6
see also first occupancy; first taking
outer space 372–3
overreaching
conveyancing 524
equitable interests 523, 524
extinguishment 524
meaning 523–4
mortgages 526–7
occupying beneficiaries 525–9
operation 524–5
registered land 543, 554
trusts 514, 524–5, 543, 544
overriding interests
1925 Act 558–61
2002 Act 556–7, 562–5
Boland case 559–61
capital interest 11–12
complexity 565

overriding interests (cont.)
- discoverability 554–5, 558
- easements 557–8
- justifications 554–5
- occupation 558–65
- principles 555–6
- profits a prendre 557
- registered land 543–4, 554–66
- rights covered 559
- transient 555

owners
- attributes 186
- identification 207
- pledges 215
- sale of goods 216
- severalty 207
- types 185–6

ownership
- amorphous notion 216–17
- attributes 186
- basis 180–2
- body cells 4–16
- bundles of rights 183, 184, 187, 190, 194
- characteristics 180–92
- chattels 215, 574, 594–5, 599
- communal *see* communal property
- contents 192–211
- contested concept 217
- contradictions 184–5
- corporate *see* corporate ownership
- Crown 146, 308
- difficulties 182–6
- disagreements 183–4
- division 185–6
- economic efficiency 79–81
- equitable interests 404, 478
- fragmentation *see* fragmentation of ownership
- group ownership 339–42
- joint tenancy *see* joint ownership
- land 213–15
- legal interests 404
- legal systems 7–10
- legal term of art 212–16
- legislation 215–16
- liberalism 184
- limitations 217–50
- market economies 10–11
- meaning 182–3
- nuisance 217–50
- organising idea 216–17
- ownership in common 340, 341
- perpetual *see* perpetual ownership
- possession compared 259–61
- private *see* private property
- proof 260
- roles 212–17
- shares 186, 322–3, 324
- standard incidents *see* incidents of ownership
- substantial use 114–15
- things 181–2
- trusts 185, 187, 215–16
- *see also* co-ownership; property rights

Palmer, N. E. 655

Pareto efficiency 49, 420

particular use rights
- aboriginal populations 280
- communal property 40, 279
- compatibility 279–80
- duration 310
- easements 279–80, 343, 347
- estates 310
- fragmentation of ownership 342–3
- grant 496–8
- meaning 278–9
- negative uses 495–6
- possession 278–80
- prescription 310, 491, 494–5
- profits a prendre 279

partnerships 324, 681–2

passing off 377–8

pawn 664

Penner, J. E. 205

Perillo, Joseph 457, 458, 459

periodic tenancies
- certainty 617–18
- characteristics 616–17
- contracts 616–18
- duration 310, 619–20
- meaning 272
- notice to quit 616–18, 622
- rent 472, 622, 628
- security of tenure 617, 618
- termination 616–18

perpetual ownership
- private property 86, 87, 146
- *see also* duration

perpetuities 311

personal representatives 336–7

personal rights
- enforcement 155, 160, 164–6, 274, 347
- matrimonial home 5–6
- specific performance 160

personal use 5, 6–7, 177, 195

personhood 54–5, 414, 422–3

Pigou, A. C. 76

Pitchford, Rohan 129–30, 131

pledges 215, 626, 664

Pollock, Frederick 195, 261, 262, 263, 287, 419, 449

pollution
- control rules 244–9
- permits 371
- polluter pays 123
- private nuisance 244–9, 627
- tragedy of the commons 63–4
- transaction costs 246–8

Posner, Richard A. 49, 225, 235–7

possession

acquiescence 263–4
acquisition of title 406–47
adverse *see* adverse possession
animus possidendi 261
bailment 280–2, 611, 653–4
characteristics 259–73
control 262–6
conversion 284
custom 119
determination 212
dispossession 392
due process 290
entitlements, justification 406, 410–11
exclusive occupation 274
finders 266, 386, 445–6
first *see* first occupancy
goods 280–2, 443–7
grant 625–33
incidents of ownership 5, 194–5
intention 266–7, 408
joint ownership 577
land 271–80
leases 611
meaning 259, 261–73
mightiest possession 110, 115, 116, 118
mortgages 626, 685–6, 691–5
nature of thing 264–5
nomadic land use 265
occupation compared 273–6, 628–32
ownership compared 259–61
particular use rights 278–80
pledges 626, 664
present interests 298–9
property rights 259–98
protection 282–92
rights *in rem* 194
self-help remedies 286–92
squatters 263, 288, 386, 392
surrender 148, 174, 691–2
title 384–6, 389–90, 406–47, 454
trespass to land 262, 263, 283
trusts of land 626–7
powers
abandonment 22
co-ownership 39
definition 22
forfeiture 23
liabilities compared 31–2
mortgagees 24
non-use 187
privileges distinguished 22, 23
powers of sale
mortgages 397, 658, 686–7, 693–5
nemo dat rule 24, 396–7, 687
options 25, 26
proceeds 694
when arising 686–7
when exercisable 687
pre-emption
explanation 482–3
first refusal 480
future interests 301–2, 479–80
investment 113
prescription
adverse possession distinguished 489–90
easements 490, 493, 542
efficiency 490–1
law reform 498–9
long user 454, 489–91, 494–7
particular use rights 310, 491, 494–5
presumed prior grant 493–4, 498
revolting fiction 493–4
Sunningwell case 171, 172, 490, 494, 497, 499–507
present interests
fragmentation of ownership 297–311
in possession 298–9
priority
derivative interests 394, 395
enforcement 512–36
equitable interests 514
first occupancy 113–15
first taking 416–17
legal interests 514
mortgages 514
registered land 554
registration 514–15
rules 512–15
subsidiary interests 512
privacy and registered land 539
private nuisance
allocation, entitlements 224–6
cricket 228–31
damages 229
encroachment 219
injury to land 219
interference with land 219–50
law reform 221
locus standi 220–2
malice 223
meaning 218–19
neighbouring land 219
pollution 244–9, 627
private property 220–4
public policy 226
requirements 219–20
role of market 225–6
television reception 222–3
traditional criteria 224
what is protected 222–4
private property
alienation 23, 159
co-ownership 339–42
communitarian objection 112
conceptual definition 191–2
economic analysis 66–74
free-riders 80
internalisation 66–7, 70

private property (cont.)
  legal relations 189–90
  Locke (John) 81–106
  Marxism 79
  perpetual ownership 86, 87, 146
  private nuisance 220–4
  public property distinguished 35
  scepticism 189–91
  wealth amassed 71
profits a prendre
  custom 169
  duration 310
  overriding interests 557
  particular use rights 279
proof
  adverse possession 417–20, 436–8
  ownership 260
proof of title
  possession 389–90
  property law 387–93
  provenance 390–1
  registration 388–9, 537
  unregistered land 391
  see also title
property
  communal *see* communal property
  dynamic nature 348–52
  dynamic relationships 24–6
  function 345–6
  future of property 371–9
  identification 484
  meaning 206–7
  moral justification 81–2, 346
  personhood 54–5, 414, 422–3
  private *see* private property
  relationship/things 17
  requirements 347–8
  scarcity 54, 59–61, 344, 346
  time and property theory 421–3
  unascertained 484–8
  see also things
property interests
  abandonment *see* abandonment
  acquisition *see* acquisition of title
  capital *see* capital interest
  certainty 159, 348
  characteristics 155–66
  continuity 9–10
  contracts 471–84
  derivative *see* derivative interests
  economic analysis 42–50
  enforcement 10–12, 155–6, 160, 164–6
  equitable *see* equitable interests
  first occupancy 14
  forfeiture *see* forfeiture
  fragmentation of ownership 297–344
  future *see* future interests
  legal *see* legal interests
  markets 252, 512–13
  meaning 26
  mechanistic quality 9
  multiple 10–11, 12
  new *see* new property interests
  numerus clausus 159–60, 347
  overriding *see* overriding interests
  property label 345–8
  re-entry *see* re-entry
  recognition 345–79
  skill and labour 10, 13
  state property 40
  third parties 347
  transmission *see* transmissibility
  see also property rights
property law
  Hindu 125–6
  issues 3–16
  meaning 17–58
  natural law 82, 83
  reform *see* Law Commission
  Roman 212–13, 215
property rights
  abandonment *see* abandonment
  air 371
  body cells 8–16
  claim-rights 20, 84, 189, 206, 208
  colonisation 138–52
  communal *see* communal property
  consent 83
  constraints 14–16
  conversion 8
  dangers 346–7
  disabilities 24, 33
  disclaimer 161
  duties 20, 21, 22, 25, 26, 27, 36
  economic analysis 42–50
  economic justification 59–81
  emotional bonds 111, 119
  entitlements *see* entitlements
  immunities 24, 26, 33
  insolvency 163–4
  interests *see* property interests
  intuitive ordering 108–9
  invisibility 455–6
  jural relations 26–7
  justifications 59–106, 107, 111–12
  liabilities *see* liabilities
  libertarian justification 111–12
  liberty 84, 87
  matrimonial home 5–6, 353–6
  meaning 207
  natural law 82, 83
  no-rights 20, 21, 22, 27–31, 39
  opposites/correlatives 19–20
  ownership *see* ownership
  passing off 377–8
  powers *see* powers

private *see* private property
privileges 20–3, 25, 27–31, 35, 38, 39, 59
protection 282–6
public order 109–10
pyramiding 369
rights analysis 19–25, 27, 36, 39, 61
signalling 110–11
simplicity 110
single systems 78–80
social anthropology 208, 209–10
specific justification 59, 107
specific performance 160–1
spectacles 18
termination 161–3
theft 108, 346–7
things, rights 18–19
torts 282–6, 292–3
tracing into exchange products 12–13
transferability 44–5
types 159–60
vindication 160–1
proprietary interests *see* property interests
Proudhon, Pierre Joseph 189
provenance, proof of title 390–1
public nuisance 218
public order, preservation 109–10
public policy
limitation of actions 445
nemo dat rule 394
private nuisance 226
public property *see* state property
public trusts 605–8
Pufendorf, Samuel 83

quasi-property 376–8

Radin, Margaret Jane 54–5, 411, 414–15, 421–5
Rawls, John 74
re-entry
appurtenant rights 162
forcible entry 291
forfeiture 162, 163, 288–90
reasonableness and interference with land 219–20, 223
receivership and mortgages 684–5
recovery of possession
direct actions 282, 283
limitation of actions 406
possession orders 686, 691
registered land
adverse possession 407, 412–13, 428
Australia 49, 544, 546, 548
boundaries 541
cadastral systems 538–9, 540, 546–8
comprehensiveness 539–40
compulsory registration 540
curtain principle 544
easements 542
enforcement 553–4
England 539–53
Europe 538–9, 546–7
first registration 548–51, 666
fraud 453
indemnities 566–8
insurance principle 544
invalidity 546
leases 540
legal interests 452
marketability 538, 540, 546
mirror principle 544
mortgages 542, 665–6
New Zealand 439
non-registration 545–6
notice 543, 558
overreaching 543, 554
overriding interests 543–4, 554–66
prejudicial information 539
priority 554
privacy 539
protection 541, 542–3
registrable disposition 545
registrable interests 541–4, 553
restrictions 543
squatters 441
stale claims 433–5
substantive registration 541–2
surveys 434
title, indefeasibility 440–2
voluntary registration 539–40
registration
commons 169
data collection 460
enforcement 514–15
formalities 451–2
nemo dat rule 396–7
non-registration, consequences 545–6
off-register dealings 515
priority 514–15
proof of title 388–9, 537
property law 537–68
purposes 537–9
rectification 396
shipping 451, 455, 537–8, 545
volunteers 396
Reich, Charles 373, 374, 375
remainder interests 298–9, 302, 305
remedies
conversion 285
damages *see* damages
security interests 660, 684–5
self-help *see* self-help remedies
trespass 286
rent
distress for rent 286, 288, 293–5
fixed-term tenancies 615–16
periodic tenancies 472, 622, 628
rentcharges 542
repairing covenants 272

residential property
  alienation, restrictions 642–3
  bankruptcy 51–2, 64
  eviction 290–1
  flats 614–15
  harassment 291
  housing trusts 637–8
  local authorities 637
  mortgages 660, 662–3
  possession orders 686, 691
  repairs 637, 638
  secure tenancies 637
  social landlords 275
  squatters 431
restrictions
  alienation 22–3, 642–4
  co-ownership 592–3
  future interests 311
  registered land 543
  self-help remedies 290–1
restrictive covenants
  building schemes 252
  case law 250–4, 256–8, 349–52, 614
  contractual limitations 250
  discharge/modification 252–3, 255
  dominant/servient tenements 349–50
  enforcement 250–2, 614
  marketability 252
  negative obligations 251, 495, 496
  notice 252
  reciprocity 252
  recognition 349–50
  use 250–8
resulting trusts
  creation 318–20, 333, 453
  equitable interests 318–20
  future interests 299
retention of title 317, 665
reversionary interests 298–9, 302, 304, 305, 641
Rideout, Roger 600
right of entry
  interests, condition subsequent 305, 306
  re-entry *see* re-entry
right to light 496, 497
rights of way
  appurtenant rights 158–9
  implied rights 454
  obstruction 38
Robbins, Lionel 42
Roman law, *dominium* 212–13, 215
Roper, R. B. 538, 544
Rose, Carol M. 112, 119–21, 265, 411, 412, 425–7
Rousseau, Jean Jacques 81, 82
Rudden, Bernard 50, 55–8, 185, 212, 214, 283, 368–71, 518, 559, 572–6, 580
Ruoff, T. B. F. 538, 539, 544
Ryan, Alan 84
Sackville, Ronald 152, 373, 374, 375
sale of goods
  contracts 472–3
  conversion 284
  failed formalities 475
  owners 216
  unascertained property 484–5
  see also goods
sale of land
  co-ownership 596–9
  see also conveyancing; transfer
scarcity
  economic analysis 42, 44
  no-property 76
  property 54, 59–61, 344, 346
Schumpeter, Joseph 71
Schwartz, A. 662
Scott, R. E. 661, 662
security and incidents of ownership 197–8
security interests
  attachment 658, 660
  characteristics 657–97
  control 661
  creation 658
  efficiency 661
  enforcement 660, 684–7
  equity of redemption 666, 669, 673–80, 685
  first recourse 659
  forms 663–7
  function 658–61
  hostage function 660
  hypothecations 664–5
  interest rates 669, 671, 672
  Kreglinger principles 670–2, 677, 684
  monitoring 661
  mortgages *see* mortgages
  nemo dat rule 658
  perfection 658
  property law 657–97
  property retention securities 665
  remedies 684–5
  rights to redeem 658
  self-help remedies 660
  signalling 661
  statutory intervention 672–3
  supply of credit 669–70
  terminology 657–8
  terms of relationship, control 669–84
  use of security 662–3
  usury 669, 671, 680–3
security of tenure
  commercial leases 616
  periodic tenancies 617, 618
Seipp, D. 349
self-help remedies
  bailment 286
  forfeiture 163, 288–90
  leases 286
  mortgagees 286, 660

possession 286–92
restrictions/deterrents 289–91
security interests 660
survival 286–90
severance
grazing rights 170–1
joint ownership 341, 573, 580–2, 584–5
rights of commons 168
statutory 584–5
shareholders
limited liability 321, 322, 324–5
partnership law 324
share ownership 186, 322–3, 324
share transfer 451
shipping
bailment 655
bulk cargo 574
charterparties 350–1, 655
equitable interests 538
mortgages 538, 655
registration 451, 455, 537–48, 545
wrecks 161
Simpson, A. W. B. 617, 619–20, 628, 674
slavery 371–2
Smith, Adam 53, 321, 322
Sokol, Mary 349
sovereignty and property rights 118, 145–7
specific performance 160–1, 162, 471, 472–3
spoilation proviso 83, 89–90
squatters
good/bad 435–6
neighbouring landowners 431
possession 263, 288, 386, 392
registered land 441
residential property 431
trespass to land 263, 386
see also adverse possession
Sreenivasan, Gopal 84
stale claims 433–5
stamp duty 459
standard incidents *see* incidents of ownership
state property
communal property distinguished 37
meaning 35
property interests 40
status rights
duration 161
inalienable rights 158
statutory tenancies, status rights 158
Stevenson, Glenn G. 40, 61, 76, 78
Stiglitz, J. 116
Stillman, Peter G. 181
subject matter, identification *see* identification of subject matter
successive interests
creation, restrictions 311
tenures and estates 307–11
trusts 303–4, 305
sufficiency proviso 83, 87–9
Sugarman, David 669, 673–80
surrender 148, 174, 691–2
Swadling, William 655
Swan, C. J. 349

Tawney, R. H. 189
television reception
communal property 37, 38
externalities 45
free-riders 48
holdouts 48
private nuisance 222–3
privilege 36, 38
transaction costs 47
tenancies
by estoppel 402, 636
exclusive possession 274
fixed-term *see* fixed-term tenancies
licences distinguished 273–6
periodic *see* periodic tenancies
repairing covenants 272
short-term 555
statutory protection 272
statutory tenancies 158
see also leases
tenancy at sufferance 273, 310, 619
tenancy at will
characteristics 618–19
duration 310, 618
meaning 273
operation of law 619, 622, 628
tenancy in common 340
tenures and estates
classification 308–9
successive interests 307–11
term of years 213
termination
derivative interests 641
fixed-term tenancies 616
periodic tenancies 616–18
property rights 161–3
terra nullius doctrine 140–5
theft
bailment 281, 610
conversion 285, 347
criminal liability 444
nemo dat rule 398, 399–402
property rights 108, 346–7
trespass to goods 285
things
conceptualisation 18
exchange value 53–4, 57
functions 50, 57
fungibles/non-fungibles 52, 55
identification of subject matter 156
intangibles *see* intangible property
new things 122–8
ownerless things 35–6
ownership 181–2

things (cont.)
possession 264–5
property/personhood 54–5
rights 18–19
subjects of property 17
use/purpose 265
use/value 53–4, 57
wealth 50–2, 56
see also goods
third parties
adverse possession 409–10
bailment 655
ius tertii 393
non-enforceability 452
property interests 347
title 393
time
fragmentation of ownership 50, 298, 299, 303
joint ownership 578
time and property theory 421–3
see also limitation of actions
title
aboriginal *see* native title
acquisition *see* acquisition of title
barter 118
disposition 384
equitable interests compared 317–18
equitable title 403–5
extinguishment *see* extinguishment
factual control 262–6
first taking *see* first occupancy
grant *see* grant
joint ownership 578
legal title 403–5, 453
meaning 383
nemo dat see nemo dat rule
possession 384–6, 389–90, 406–47, 454
proof *see* proof of title
property law 383–405
radical title 146
relativity 383, 386–7, 393, 405, 441
sovereignty distinguished 145
third parties 393
trustees in bankruptcy 338, 454
see also entitlements
torts
conversion *see* conversion
goods 282–3, 444
interference with goods 283, 285, 393, 599
nuisance *see* private nuisance
passing off 377–8
property rights 282–6, 292–3
role 282–3
scope 283–6
unlawful eviction 290, 291
trademark dilution 131, 132
tragedy of the commons 60–5, 168
transaction costs
collective action 47–8
economic analysis 47–9, 225–6
first occupancy 114
free-riders 48
holdouts 48
imperfect information 47
pollution control 246–8
transfer
equitable title 404
operation of law 454
rights, transferability 44–5
shares 451
transmissibility
exchange products 12–13
incidents of ownership 5–6, 198–9
trespass to goods
bailment 286
damage 284
locus standi 285–6
scope 285
trespass to land
criminal liability 292
locus standi 285–6
long user compared 494–5
possession 262, 263, 283
scope 285
squatters 263, 386
tolerated 627, 633–5
trustees
co-ownership 341–2
expenses 335
fraud 516, 519–22
joint ownership 573–4
liabilities 334, 337
supervisory jurisdiction 334
trust property 312, 334
two-trustees rule 529
trustees in bankruptcy 338, 454
trusts
assets 312, 334, 335
co-ownership 11, 341–2
constructive *see* constructive trusts
creation 333
determinable interests 305
equitable interests 312, 314, 514
fluctuating assets 157, 335
fragmentation of ownership 333–5
life estate 309
managerial property holding 332–5
overreaching 514, 524–5, 543, 544
ownership 185, 187, 215–16
public trusts 605–8
purposes 333
resulting *see* resulting trusts
settlors 334
successive interests 303–4, 305
wills 334
see also beneficiaries
trusts of land

beneficiaries 626–7
co-ownership 341–2, 591
declarations of trust 450
evidence 450
management 342
overreaching 524–5, 543
possession 626–7
Tully, James 84, 87
Turner, Richard 674, 675, 677

Ulen, Thomas 129
unascertained property 484–8
unincorporated associations 599–604
United States
aboriginal populations 112, 120–1
first occupancy 112, 116, 118, 121–2
unowned property *see* first occupancy; first taking
unregistered land 391, 407, 433
use
anomalous use rights 627
beneficial use 611–12
communal property 40, 279
general *see* general use rights
interference 219–50
nomadic land use 112, 139, 143, 265
non-use 161, 174, 187
religious observance 178
restrictive covenants 250–8
substantial use 114–15
things, purpose 265
use and enjoyment 5, 6–7, 177, 195, 222–3
value 53–4, 57
see also long user; prescription
usury 669, 671, 680–3

utilitarianism
adverse possession 411, 414, 423–4
Bentham (Jeremy) 111, 184, 220, 349, 376

value
dissipation 116, 118
efficiency 48–9
future value 112–13, 116
labour 85, 86
maximisation 43, 46, 48, 66, 70
use/exchange 53–4, 57
Veblen, Thorstein 327, 328
volunteers 396

Wade, H. W. R. 195, 618
Waldron, Jeremy 78–9, 84, 89, 121, 183, 184, 189–92, 216, 217, 323–4, 374
Warrington, Ronnie 669, 673–80
water/diamond paradox 53–4
wealth
maximisation 133
private property 71
things 50–2, 56
Weir, Tony 284, 285, 292–3
whaling 128–9, 132–8
Whelan, F. G. 183, 184
White, J. J. 661, 662
Whiteman, J. 222
wild animals 128–38
Wittgenstein, Ludwig 210
Wright, R. S. 195, 261, 262
Wu, Tang Hang 498, 499

Zerbe 122